Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA
PETITIONER,

-vs-

EUGENE ROBERT TUCKER
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Arizona Supreme Court err by holding that this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) requires not only a jury determination of an aggravating factor rendering the defendant eligible for the death penalty, but also a jury determination of the mitigating circumstances and whether the mitigating circumstances are sufficiently substantial to warrant leniency?

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OPINION BELOW

On May 5, 2003, the Arizona Supreme Court vacated Eugene Tucker's death sentence and remanded for resentencing based upon its finding that *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*), requires that a jury determine the existence of mitigating circumstances and whether the mitigating circumstances are sufficiently substantial to warrant leniency. *State v. Tucker*, 68 P.3d 110, ¶¶ 53–54, 67–68 (Ariz. 2003). (Appendix A.)

The Arizona Supreme Court applied a harmless error analysis in its determination that no *Ring II* error occurred with respect to two aggravating circumstances. The court's analysis regarding mitigation and *Ring II* error is based on an interim decision rendered in consolidated proceedings involving this case and the other Arizona cases pending on direct appeal at the time *Ring II* was decided. *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (Ariz. 2003) *(Ring III)* (Appendix B). Applying *Ring III*, the court concluded that Tucker committed multiple homicides during a continuous course of criminal conduct and that no reasonable jury could have concluded otherwise. *Id.* at ¶¶ 65–66. The Arizona Supreme Court also found there was overwhelming evidence that one of the victims (AnnMarie Merchant) suffered physically prior to being murdered and "no reasonable jury could have found the murder of AnnMarie was anything but especially cruel." *Id.* at ¶¶ 60–61. With respect to the other two victims, the Arizona Supreme Court found that *Ring II* error was not harmless as to one of the aggravating circumstances because the court could not conclude that a jury would have found the murders especially heinous and depraved. *Id.* at ¶¶ 63–64. Although the Arizona Supreme Court found two aggravating circumstances rendering Tucker eligible for the death penalty for all three murders, the court held that *Ring II* error occurred because it could not conclude whether a reasonable jury would have found the same mitigating circumstances as the trial court and whether "a jury would have assessed the mitigating evidence as did the trial judge." *Id.* at ¶¶ 67–68. Accordingly, the court remanded Tucker's case to the trial court for resentencing. *Id.* at ¶¶ 69.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a Writ of Certiorari issue to review the decision of the Arizona Supreme Court that vacated Tucker's sentence and remanded the case for resentencing. The Arizona Supreme Court issued its decision on May 5, 2003. Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a); and Supreme Court Rule 10.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

On November 1, 1999, a state grand jury indicted Tucker for the murders of AnnMarie Merchant, her brother, Roscoe Merchant, and her brother's girlfriend, Cindy Richards. Tucker was also charged with sexual assault, kidnapping, and burglary. A jury convicted Tucker of all charges. The trial court sentenced Tucker to death for each of the murders and to aggravated terms of imprisonment for the non-capital convictions.

AnnMarie Merchant and Tucker had a relationship for nearly a year before the murders. AnnMarie lived with her brother Roscoe Merchant and Roscoe's girlfriend, Cindy Richards. The relationship between AnnMarie and Tucker deteriorated, and on July 15, 1999, Tucker went to AnnMarie's apartment and murdered her, Roscoe, and Cindy. Tucker shot Roscoe and Cindy in the head while they were sleeping in bed. Cindy's seven-month-old son was lying in a nearby crib, but was unharmed.

Tucker and AnnMarie engaged in a tremendous struggle in AnnMarie's room. When police officers found AnnMarie, she was lying face down on the floor in her bedroom. Her hands appeared to have been handcuffed behind her back and there were ligature marks on her wrists consistent with having been handcuffed. There were also ligature marks around AnnMarie's neck. AnnMarie's mouth was covered with duct tape.

AnnMarie sustained massive blunt force trauma injuries, primarily to the back of her head. She was also shot under her chin at close range and again behind her left ear.

Before killing AnnMarie, Tucker sexually assaulted her. AnnMarie had extensive bruising around her vagina and anus, which was not consistent with consensual sex. Semen found on AnnMarie's left inner thigh and on her t-shirt matched Tucker's DNA profile in all 14 loci.

The State alleged that Tucker committed multiple homicides under A.R.S. § 13–703(F)(8); that the murders were committed in an especially cruel, heinous, and depraved manner (A.R.S. § 13–703(F)(6)); and that Tucker created a grave risk of death to another person, pursuant to A.R.S. § 13–703(F)(3), by leaving baby Anthony alone after the murders. The trial court found that AnnMarie's murder was especially cruel, heinous, and depraved, and that Richard's and Cindy's murders were especially heinous and depraved. The trial court also found that Tucker committed multiple homicides, and that Tucker created a grave risk of death to Anthony Richards by leaving him helpless in his crib after the murders.

Tucker proffered good character, lack of prior criminal history, potential for rehabilitation, and age (18) as mitigating circumstances. The trial court found Tucker's age and lack of prior criminal history as mitigating circumstances. The trial court weighed the aggravating and mitigating circumstances and found that the mitigating circumstances were not sufficiently substantial to warrant leniency.

Following this Court's decision in *Ring II*, the Arizona Supreme Court consolidated this case with other death penalty cases that were pending on direct appeal to address the applicability of *Ring II* to those cases.

On April 3, 2003, the Arizona Supreme Court issued a ruling in the consolidated case, holding, among other things, that (1) capital sentences imposed under Arizona's prior capital sentencing scheme are subject to review for harmless error; (2) under *Ring II* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Sixth Amendment does not afford capital defendants the right to have a jury decide whether the State has established an aggravating circumstance based on the defendant's prior convictions; and (3) *Ring II* requires a jury determination of mitigating circumstances and the weighing and balancing of aggravating and mitigating circumstances. Thus, the court held there must be a harmless error analysis of findings regarding the existence of mitigation and whether mitigation is sufficient to warrant leniency. *State v. Ring*, 204 Ariz. 534, at ¶¶ 50, 63, 88–89, 65 P.3d 915.

On May 5, 2003, the Arizona Supreme Court applied those holdings to the instant case, vacating Tucker's death sentence and remanding the case for resentencing. *Tucker*, 68 P.3d 110 at ¶¶ 67–68. The Arizona Supreme Court found that one of the aggravating circumstances at issue (multiple homicides) was established beyond a reasonable doubt and that no reasonable jury could conclude otherwise. *Id.* at ¶¶ 65–66. The court also found another aggravating circumstance (especially cruel) had been established beyond a reasonable doubt as to AnnMarie's murder and that no reasonable jury could have found otherwise. *Id.* at ¶¶ 60–61. The trial court found that Cindy Richards' and Roscoe Merchant's murders were especially heinous and depraved, but the Arizona Supreme Court vacated that finding because it could not conclude that a reasonable jury would have concluded the same. *Id.* at ¶¶ 63–64. After finding *Ring II* error was harmless with regard to two aggravating circumstances, the Arizona Supreme Court remanded the case for resentencing based on its view that *Ring II* error occurred because the trial judge, not the jury, made findings regarding the mitigating circumstances proffered by Tucker and determined that the mitigating circumstances were not sufficiently substantial to warrant leniency. *Id.* at ¶¶ 67–68.

REASON WHY THE WRIT SHOULD ISSUE

There is a conflict among the states regarding how to apply *Ring II*. The Arizona, Nevada, and Colorado Supreme Courts have broadly interpreted *Ring II* error to include the determination of mitigating circumstances and the weighing and balancing of aggravation and mitigation. That conclusion conflicts with rulings from courts in Delaware, Nebraska, Oklahoma, Alabama, Indiana, and Florida. This Court should accept review to clarify this confusion regarding the application of *Ring II*.

Ring II should not be interpreted to require a jury, rather than a judge, to find every aggravating circumstance, but only *an* aggravating circumstance that renders a defendant eligible for the death penalty. Likewise, *Ring II* should not be interpreted as establishing a Sixth Amendment right to have a jury determine whether mitigating circumstances exist and whether mitigation is sufficiently substantial to warrant leniency. In *Ring II*, this Court noted that the issue presented was very narrow—whether an aggravating factor that makes a defendant death eligible may be found by the judge, or whether the Sixth Amendment's jury trial guarantee applies to that finding. *Ring II* was based on this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2002), that the jury trial guarantee extends to any fact that increases the sentencing range. In Arizona, a finding of at least one aggravating circumstance necessarily increases the sentencing range to include a possible death sentence. Thus, a jury finding (or a finding of harmless error) regarding the existence of at least one aggravating circumstance extends the sentencing range to include a possible death sentence and therefore satisfies *Ring II*.

Finally, the Arizona Supreme Court's ruling affects not only the instant case, but 26 other Arizona cases that were pending on direct review at the time this Court decided *Ring II*. The State of Arizona has filed a petition for writ of certiorari in *State v. Pandeli*, U. S. Supreme Court No. 03-15, filed June 27, 2003, and anticipates that petitions will be filed in other similarly situated cases as the Arizona Supreme Court issues rulings reflecting a harmless error analysis under *Ring II*. This

Court should accept review in these cases to avert unwarranted resentencing proceedings, with their concomitant costs to the State and to victims, in those cases.

ARGUMENTS

I.

THERE IS A CONFLICT AMONG THE STATES REGARDING WHETHER, UNDER *RING V. ARIZONA*, THE SIXTH AMENDMENT JURY TRIAL RIGHT IN CAPITAL CASE SENTENCING PROCEEDINGS EXTENDS BEYOND THE RIGHT TO A JURY DETERMINATION OF AN AGGRAVATING CIRCUMSTANCE THAT RENDERS THE DEFENDANT ELIGIBLE FOR THE DEATH PENALTY.

State courts have reached conflicting conclusions regarding the scope of *Ring II*. The Arizona Supreme Court held in the instant case that under *Ring II*, there is a Sixth Amendment right to a jury determination of whether mitigating circumstances exist and whether those circumstances are sufficiently substantial to warrant leniency. *Tucker*, 68 P.3d 110, at ¶ 67. The Colorado Supreme Court recently reached the same conclusion in *Woldt v. Colorado*, 64 P.3d 256, 265–66 (Col. 2003), as did the Nevada Supreme Court in *Johnson v. Nevada*, 59 P.3d 450, 460 (Nev. 2002).

In contrast, the Delaware Supreme Court recently ruled that *Ring II* does *not* extend to the weighing phase of the capital sentencing process; once a jury finds a statutory aggravating circumstance that renders the defendant death eligible, a sentencing judge may weigh aggravating and mitigating circumstances. *Brice v. Delaware*, 815 A.2d 314, 322 (Del. 2003). The Delaware court expressly rejected the argument that *Ring II* requires the jury to find "every fact" relied on by the sentencing judge in imposing death. 815 A.2d, at 321–22. The Nebraska Supreme Court has similarly ruled that *Ring II* does not afford capital defendants the right to have a jury weigh and balance aggravating and mitigating

circumstances; those determinations fall outside the jury's "eligibility" decision and instead are part of the "selection decision," which can be performed by a judge without violating the Sixth Amendment. *State v. Gales*, 658 N.W.2d 604 (Neb. 2003).

Alabama, Oklahoma, Florida, and Indiana courts have similarly rejected the notion that *Ring II* requires that a jury weigh aggravating and mitigating circumstances. In *Lee v. State*, 2003 WL 21480428 (Ala. Crim. App. June 27, 2003), the Alabama Court of Criminal Appeals held that, because the jury convicted Lee of the capital offenses of robbery-murder, it necessarily found the existence of the statutory aggravating circumstance (committing a murder while engaged in the commission of a robbery or attempted robbery). *Id.* at 50. The court concluded that *Ring II* was satisfied because a jury, not the judge, determined the existence of an aggravating circumstance rendering Lee death eligible. *Id.* The Alabama court expressly rejected Lee's argument that *Ring II* also requires the jury to weigh the aggravating and mitigating circumstances. *Id.* (citing *Ex parte Waldrop*, 2002 WL 1001194 (Ala. Nov. 22, 2002)); *see also Ex parte Hodges v. State*, 2003 WL 1145451, *6, *7 (Ala. Mar. 14, 2003) (upholding judicial-override provision; because the defendant was eligible for the death penalty when the jury found that he committed the murder while he was engaged in a robbery, the subsequent determination by the trial court that the especially heinous, atrocious, or cruel factor was established and that aggravating circumstances outweighed the mitigating circumstances did not implicate *Ring II* or *Apprendi*); *State v. Torres*, 58 P.3d 214 (Crim. App. Okla. 2002) (rejecting claim that *Ring II* precludes an appellate court from reweighing the evidence of aggravating and mitigating circumstances after invalidating an aggravating circumstance: "Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that *Ring [II]* requires."); *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) (per curiam opinion analyzing effect of *Ring II* on Florida statutory scheme and denying post-conviction relief based on *Ring II*; two Justices concurred only because one of the four aggravators found in connection with the murder was Bottoson's prior conviction of a crime involving the threat of violence—an aggravator that need not be found by the jury under

Almendarez-Torres); *Wrinkles v. State*, 776 N.E.2d 905, 907–08 (Ind. 2002) (multiple murders aggravating circumstance implicit in jury's verdict; therefore *Ring II* is not implicated).

Given the clear conflict in the way state courts have interpreted this Court's Sixth Amendment analysis in *Ring II*, this Court should accept certiorari review to provide guidance and clarity.

II.

THE ARIZONA SUPREME COURT ERRED BY FINDING THAT *RING V. ARIZONA* ESTABLISHES A SIXTH AMENDMENT RIGHT TO HAVE A JURY ASSESS WHETHER MITIGATING CIRCUMSTANCES EXIST AND WHETHER THE MITIGATING CIRCUMSTANCES ARE SUFFICIENT TO WARRANT LENIENCY.

In *Ring II*, this Court held that Arizona's death penalty sentencing statute offended the Sixth Amendment to the extent it required a judge, rather than a jury, to determine the presence or absence of an aggravating circumstance that renders a first-degree murder defendant eligible for the death penalty. Based on *Apprendi*'s holding that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, this Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), in which this Court had rejected the same Sixth Amendment challenge to Arizona's statute (A.R.S. § 13–703). *Ring II*, 536 U.S. at 609.

The Arizona Supreme Court has interpreted *Ring II* too broadly. This Court's analysis in *Ring II* focused on whether a finding that an aggravating factor existed *increased the range of sentence* the defendant faced. *See* 536 U.S. at 602. The Arizona Supreme Court had indicated in *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001) (*Ring I*), that "the death sentence becomes possible only after the trial judge makes a factual finding that *at least one* aggravating factor is present." (Emphasis added.)

Relying on the Arizona Supreme Court's interpretation of Arizona law, this Court found that Arizona's first-degree murder statute authorized a maximum penalty of death "only in a formal sense." This Court stated:

> A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that *a statutory aggravating factor exists.* Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.
>
> . . .
>
> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. This was so because, in Arizona, a "death sentence may not legally be imposed . . . unless *at least one aggravating factor* is found to exist beyond a reasonable doubt."

536 U.S. at 596 (internal quotes omitted, emphasis added). This Court thus held that "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." 536 U.S. at 604 (quoting *Apprendi*, 530 U.S. at 494).

Apprendi similarly focused on whether a court could impose a sentence *beyond the range* authorized by the jury's verdict. Apprendi pled guilty to possession of a firearm for an unlawful purpose, a crime designated in New Jersey's substantive criminal statute as a second-degree offense, punishable under New Jersey's felony sentencing statute by a 5 to 10-year prison term. *Apprendi*, 530 U.S. at 468–70. The charging instrument made no reference to a third New Jersey statute aimed at hate crime, which enhanced the sentencing range from the second-degree to first-degree level (from 10 to 20 years) upon a finding by the sentencing court (by a preponderance of the evidence) that the defendant committed the crime with a racially biased purpose. *Id.* at

469. The New Jersey trial court made such a finding and imposed a 12-year sentence, which two state appellate courts subsequently upheld. *Id.* at 471.

This Court determined that Apprendi had a constitutional right to a jury finding on the issue of racial bias, and held that enhancement under New Jersey's hate crime statute violated the Sixth Amendment right to a jury trial because it effectively convicted Apprendi of a greater, uncharged offense. *Id.* at 475–76, 494 n.19. Confirming a principle previously set forth in *Jones (Nathaniel) v. United States*, 526 U.S. 227 (1999), this Court stated:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."

Apprendi, 530 U.S. at 490 (citing *Jones*, 526 U.S. at 252–53). This Court was careful to point out, however, that not every factual determination relating to sentencing need be found by a jury:

> We should be clear that nothing in this [common-law] history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. *See e.g., Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949) . . . .

530 U.S. at 481 (emphasis in original).

In the consolidated proceedings conducted by the Arizona Supreme Court following *Ring II*, the State argued that the court should uphold capital sentences imposed under Arizona's disapproved, former statute in three circumstances: (1) where the jury implicitly found one aggravating factor, (2) where the trial judge found one factor established by overwhelming and essentially uncontroverted evidence, or (3) where the aggravator was outside the purview of *Ring II*. Any one of these findings renders the defendant "death eligible" based on the presence of one aggravating factor. The State posited that nothing in *Ring II* prevents a trial judge from finding additional aggravating circumstances, as well as finding mitigating circumstances and balancing them against the aggravating circumstances.

The Arizona Supreme Court rejected the State's argument. The court acknowledged that "[a] narrow reading of *Ring II* may permit a judge to decide the existence of additional aggravating factors," but nevertheless concluded that *Ring II* requires a jury to consider all aggravating factors urged by the State. The Arizona Supreme Court further noted that the death penalty could not have been imposed under the statute in place when the defendants, including Tucker, were sentenced unless the trial court, acting as the sentencer, concluded that mitigating factors were not sufficiently substantial to call for leniency. The court thus held that an analysis of *Ring II* error includes a determination of the mitigating circumstances and whether those circumstances outweigh the aggravating circumstances. *Ring III*, 65 P.3d 915, ¶ 88–89, *Tucker*, 68 P.3d 110, ¶¶ 67–68; *see also State v. Pandeli*, 65 P.3d 950, ¶10 (Ariz. 2003).

The Arizona Supreme Court's expansive reading of *Ring II* is unwarranted given the narrow scope of the issue addressed in *Ring II*:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998),

> which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

536 U.S. at 597 n.4. Furthermore, both *Ring II* and *Apprendi* focused exclusively on a Sixth Amendment requirement that the jury make factual findings that set the outer limits of the sentencing *range*. Neither case established a Sixth Amendment basis for requiring a jury to make the ultimate sentencing decision; such a requirement was urged only by Justice Breyer in a concurring opinion. *Ring II*, 536 U.S. at 614 (J. Breyer, concurring based on his belief that the Eighth Amendment mandates jury sentencing in capital cases). Thus, when a state court finds that an aggravating circumstance is outside the purview of *Ring II*, or that *Ring II* error relating to one aggravating circumstance is harmless, that finding satisfies the Sixth Amendment requirements set forth in *Ring II* and *Apprendi*. *See Brice v. Delaware*, 815 A.2d, at 321–22 (*Ring II* requires only that a jury find the existence of *an* aggravating circumstance necessary for imposition of the death penalty). (Emphasis added.)

In the present case, the Arizona Supreme Court expressly found that there was no *Ring II* error with regard to the multiple homicides aggravator (applicable to all three victims) or the especially cruel

aggravator relating to AnnMarie's murder. *Tucker*, 68 P.3d 110, ¶¶ 60–61, 65–66. Those findings satisfied *Ring II*, and there was no need for an analysis of whether error relating to the lack of a jury finding regarding a second aggravator or the weighing of aggravation and mitigation was harmless.

This Court's decision in *United States v. Harris*, 536 U.S. 545 (2002), decided the same day as *Ring II*, supports the conclusion that the finding of any one aggravating circumstance satisfies the Sixth Amendment requirement set forth in *Ring II*. In *Harris*, this Court rejected a claim that the Sixth Amendment requires a jury finding of a fact (the defendant brandished a gun during the commission of the offense) increasing the statutory minimum sentence. 536 U.S. at 554. This Court observed that, unlike a statutory factor that increases the maximum penalty for the defendant's crime, a statutory factor setting a mandatory minimum "ha[s] an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion." *Id.* This Court further noted that the brandishing statute "does not authorize the judge to impose 'steeply higher penalties'—or higher penalties at all—once the facts in question are found." *Id.*

This Court also reiterated its pronouncement in *Jones* that "[i]t is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." *Harris*, 536 U.S. at 558 (citing *Jones*, 526 U.S. at 248). This Court then held that "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Id.*

In the present case, findings regarding mitigation likewise operated to "constrain, rather than extend, the sentencing judge's discretion." Once the sentencing range included a possible death sentence based on the presence of at least one statutory aggravating circumstance, there was

no *Ring II/Apprendi* error when the trial or appellate court balanced aggravating and mitigating circumstances. *See also Zant v. Stephens*, 462 U.S. 862 (1983) (holding that in a state where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of one aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury).

Finally, *Ring II* error should be narrowly interpreted because it does not go to the fairness or reliability of the sentencing process. The sentencing error in *Ring II* and in the instant case was that a fair and impartial judge, rather than a fair and impartial jury, determined the existence of aggravating circumstances under A.R.S. § 13–703. The error at issue did not implicate the fundamental fairness of the process, and there is not a compelling basis for broadening this Court's holding in *Ring II* beyond the scope of that decision.

In *United States v. Cotton*, 535 U.S. 625, 632–34 (2002), this Court noted the injustice that would result if a sentence were to be reversed on error that "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." Such an injustice will occur in the instant case if a resentencing proceeding is required. Given the Arizona Supreme Court's conclusion that no *Ring II* error arose from the finding of the prior conviction aggravator and that the evidence relating to the second aggravator (special cruelty, heinousness, or depravity) was overwhelming and essentially uncontroverted, there is no inherent unfairness to the defendant in ending the harmless error inquiry there. The real threat to the "fairness, integrity, and public reputation of judicial proceedings" would be to require a resentencing in this case notwithstanding a finding of harmlessness as to aggravating factors that set the outer limits of the sentencing range to include a possible death sentence.

CONCLUSION

There is a conflict among the states regarding whether, under *Ring II*, the Sixth Amendment jury trial guarantee is satisfied in a capital case when there is a jury finding (or a finding of harmless error) relating to the existence of an aggravating circumstance that makes the defendant eligible for the death penalty. This Court should accept certiorari review to address that conflict and to reject the Arizona Supreme Court's finding that the Sixth Amendment requires a jury finding regarding every aggravating circumstance in a capital case and a jury determination of whether mitigating circumstances exist and whether the mitigation outweighs aggravation. Accordingly, and based on the foregoing authority and arguments, the State of Arizona respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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CRM01-0223
114488

APPENDIX A

[Filed May 5, 2003]

IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, v. EUGENE ROBERT TUCKER Appellant.	)	Supreme Court No. CR 01-0091-AP Maricopa County Superior Court No. CR1999-015293 **OPINION**

Appeal from the Superior Court in Maricopa County
The Honorable Michael D. Jones, Judge

CONVICTIONS AND ALL SENTENCES EXCEPT SENTENCES OF DEATH AFFIRMED AND DEATH SENTENCES REMANDED FOR RESENTENCING

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R Y A N, Justice

¶1 Eugene Robert Tucker was convicted of three counts of first degree murder for the July 15, 1999, deaths of AnnMarie Merchant, Roscoe Merchant, and Cindy Richards. Tucker was also found guilty of sexual assault, kidnapping, and burglary in the first degree. He was sentenced to death for each of the first degree murder counts. Tucker received the following sentences for his other crimes: Twenty-five years to life for the sexual assault conviction, twenty-one years for the kidnapping conviction, and twenty-one years for the burglary conviction. These sentences were ordered to be served consecutively.

¶2 Appeal to this court is mandatory and automatic when a trial court imposes a sentence of death. Ariz. R. Crim. P. 26.15 and 31.2(b). This court has jurisdiction under Article 6, Section 5(3), of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 13-4031 (2001).

I. BACKGROUND[1]

¶3 AnnMarie Merchant and Roscoe Merchant were sister and brother. Cindy Richards was Roscoe's girlfriend. Tucker had a relationship with AnnMarie for nearly a year before her death. He had known Roscoe for slightly longer. Tucker and AnnMarie had engaged in sexual intercourse at least twice. Tucker also had visited the apartment where the murders took place on a number of occasions.

¶4 AnnMarie often spoke on the telephone to family and friends. She was in regular contact with her aunt, Hope Barnes, with whom she had

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[1] On appeal, the court views the facts presented in the trial below in a light most favorable to sustaining the verdict. *State v. Gallegos*, 178 Ariz. 1, 9, 870 P.2d 1097, 1105 (1994).

a close relationship. AnnMarie spoke almost daily with her cousin, Cassandra Barnes, Hope's daughter, with whom she also had a close relationship.

¶5 On the evening of July 15, 1999, after a number of telephone calls to the Merchant apartment went unanswered, Hope's husband called the police. When police arrived at the apartment, they found AnnMarie's body face down with her hands behind her back. Her mouth was covered by duct tape. She was dressed in only a gray tee-shirt and bra. A pair of jeans was found near her body. Physical evidence obtained from AnnMarie's body included semen residue on her left inner thigh and on the front of her tee-shirt. Testing of these semen samples resulted in a fourteen-point match with Tucker's DNA.[2]

¶6 Police found a single fingerprint belonging to Tucker at the crime scene. It was located on the handle of the refrigerator door.

¶7 During a search of the Tucker home, the police recovered a roll of duct tape. Tests on the roll of tape did not disclose any biological material linked to AnnMarie. A side-by-side comparison of the tape found on AnnMarie's body and the tape found at the Tucker home indicated some similarities, but not a conclusive match.

¶8 Ligature marks on AnnMarie's wrists indicated that she may have been handcuffed. Three pairs of handcuffs were recovered during the search of Tucker's home. The medical examiner did not compare the seized handcuffs to the marks on AnnMarie's wrists. All three pairs of handcuffs were tested for the presence of biological material, but none was found linking the handcuffs to AnnMarie. At trial, Tucker testified that he had the handcuffs because he was taking law enforcement classes in school.

¶9 AnnMarie's body had a ligature mark around the neck. The medical examiner testified it could have been made by a length of telephone

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[2] Testimony indicated that only identical twins would share all fourteen points in the DNA test result.

cord found near the body. The medical examiner indicated that the ligature mark was made before AnnMarie's death.

¶10 AnnMarie was bludgeoned several times on the top and back of her head by a blunt instrument. A broken glass table top and the general disarray of the room indicated an intense struggle took place. The medical examiner believed that the weapon used to inflict the head wounds was cylindrical and one-quarter to one-half inch in diameter. A search of the crime scene, the surrounding area, and the Tucker home yielded no object matching those dimensions that contained any biological material that came from AnnMarie.

¶11 AnnMarie had bruising around her vagina and anus. The medical examiner testified that the extent of the bruising was not a normal result of sex. She opined that the victim had been made to suffer based on the depth of the bruising.

¶12 AnnMarie suffered two gunshot wounds to the head. The shots were fired at close range. The medical examiner found that the cause of AnnMarie's death was two gunshot wounds, blunt force trauma, and strangulation. She indicated these were all contributing factors and could not isolate any one of them as the cause of death.

¶13 Roscoe's and Cindy's bodies were found in a separate bedroom lying in their bed. Each had a single gunshot wound to the head. Cindy also had a "through and through" gunshot wound to her thumb. The medical examiner could not determine whether Roscoe and Cindy were awake or asleep when they were shot. Cindy's seven month-old son was found unharmed lying nearby in his crib.

¶14 The State's ballistics expert testified that the slugs recovered from all the victims were from .38 caliber bullets. The lands and grooves on one of the slugs indicated it most likely was fired from a Colt weapon. No gun was found at or near the crime scene matching that description. A search of Tucker's home turned up only a Smith & Wesson .357 caliber handgun.

¶15 The ballistics expert testified that the weapon found in Tucker's home was not the murder weapon. Police found a number of different types of .38 caliber bullets in the Tucker home. The State presented evidence that .38 caliber bullets can be fired from a .357 gun. But because no shell casings were found at the crime scene, police could not make a comparison with the bullets found in Tucker's home. Furthermore, the type of bullet that killed all three victims was different from any of the types of bullets found in the Tucker home.

¶16 At trial, Tucker contended that the physical evidence found at the crime scene, his fingerprint and semen, could be explained by his prior visits to the apartment and prior sexual contact with AnnMarie. He testified that he had cooperated with the police by voluntarily agreeing to be interviewed and giving a blood sample. He attempted to counter the State's theory that he murdered the victims because of AnnMarie's rejection of his sexual advances by claiming the relationship had ended by mutual agreement and that he had another girlfriend at the time. However, Tucker did not know this girlfriend's last name or her telephone number, and he could not remember when they started seeing each other.

¶17 Tucker also raised an alibi defense. His mother claimed that he was home helping her with yard work at the time the murders took place. Mrs. Tucker testified that she had taken the day off from work specifically to do yard work and that Tucker was home with her all day. His father testified that Tucker was doing yard work with his mother when he arrived home from work in the afternoon on the day of the murders. Dennis Hall, a postal carrier, testified that he saw Mrs. Tucker and a young man who resembled Tucker doing yard work on the day of the murders.

¶18 The jury found Tucker guilty on all counts. Following the verdict, the court held an aggravation and mitigation hearing. The State proved three aggravating factors: (1) Tucker knowingly created a grave risk of death to Cindy's baby by killing all of his care givers and leaving him alone in the house, A.R.S. § 13-703(F)(3) (2001); (2) the murder of AnnMarie was especially cruel, and all the murders were heinous and

depraved, A.R.S. § 13- 703(F)(6); and (3) Tucker had been convicted of other homicides that were committed during the commission of the offense, A.R.S. §13-703(F)(8). Tucker claimed his young age, A.R.S. § 13-703(G)(5), rehabilitation potential, good character, and lack of prior criminal history as mitigating factors. *See* A.R.S. § 13-703(G). The court found Tucker's age and lack of criminal history to be mitigating factors, but rejected Tucker's claims of good character and rehabilitation potential as mitigating factors. The court found the aggravating factors outweighed the mitigating factors and sentenced Tucker to death on all three first degree murder counts.

II. Discussion

A.

¶19 Tucker claims that the trial court should have disqualified his trial counsel, Greg Clark, because of a conflict of interest. He contends that Clark had an actual conflict of interest that prevented him from pursuing a third-party defense that would have implicated a former client of Clark.

¶20 Well before the trial, the State filed a motion to determine counsel. The motion alleged that Clark might have a conflict because he had represented Patrick Kozakiewicz, a potential witness in Tucker's case. Kozakiewicz and Tucker knew each other. During police interviews, Tucker indicated that Kozakiewicz knew, and did not like, Roscoe. The State's motion also stated that Kozakiewicz, during recorded jailhouse telephone conversations, told his family that he planned to testify against Tucker in this case. Additionally, Kozakiewicz told family members that Clark was going to arrange for a plea bargain in exchange for his testimony. Tucker claims that this evidence shows that Clark had a conflict of interest that prevented him from pursuing Kozakiewicz as a third-party defendant.

¶21 At a hearing on the matter, Clark stated that he had withdrawn from representation of Kozakiewicz immediately after the State filed its

motion to determine counsel.[3] Clark had represented Kozakiewicz in two matters unrelated to this case: a probation violation and a charge that Kozakiewicz possessed contraband while he was in jail on the probation violation. Clark avowed that he had only two brief conversations with Kozakiewicz and that Tucker's name was never mentioned. He equivocated as to whether he would pursue a third-party defense involving Kozakiewicz.

¶22 The trial court found no actual or potential conflict of interest. The court further found that the potential conflict was fully disclosed to Tucker and that in agreeing to keep Clark as his counsel, he waived any violation of his Sixth Amendment rights.[4] Tucker argues the trial court's refusal to disqualify Clark led to structural error requiring a new trial.

¶23 Generally, cases in which courts have found structural error involve a deprivation of counsel entirely, or denial of access to counsel

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[3] Clark's Notice of Association in this case was filed on March 1, 2000. The State filed a Motion for Determination of Counsel on March 21, 2000. The next day Clark filed a Motion to Withdraw from his representation of Kozakiewicz, which he says was granted on March 23, 2000. Thus, Clark was counsel of record for both Tucker and Kozakiewicz for only three weeks, a little more than five months before Tucker's case came to trial on August 29, 2000.

[4] The trial court based its finding of waiver on the following exchange:

> THE COURT: Mr. Tucker, you understand that the issue is the State is asking me to determine whether or not Mr. Clark will continue as your attorney in this case. Do you have a position you would like to tell they [sic] about whether you would like Mr. Clark to continue or not based upon a potential conflict with the witness Mr. Sakovitz [sic].
> THE DEFENDANT: No, sir, I don't.
> THE COURT: You are okay with Mr. Clark continuing then?
> THE DEFENDANT: Oh, yes.
> THE COURT: Do you want Mr. Clark to continue?
> THE DEFENDANT: Yes.

We do not address the issue of waiver in this case because at oral argument the State conceded that, on this record, the evidence that Tucker waived his Sixth Amendment rights is inadequate.

at a critical stage in the trial process. *Mickens v. Taylor,* 535 U.S. 162, ___, 122 S. Ct. 1237, 1240-41 (2002) (citing cases). The Sixth Amendment violation claimed in this case does not rise to that level. Rather, Tucker's challenge is that the trial court improperly refused to disqualify defense counsel. We review a trial court's decision on the disqualification of counsel for abuse of discretion. *State v. Jones,* 185 Ariz. 471, 482, 917 P.2d 200, 211 (1996) (citing *Okeani v. Superior Court,* 178 Ariz. 180, 181, 871 P.2d 727, 728 (App. 1993)).

¶24 In *Jones,* this court examined whether the trial court wrongly refused to grant a withdrawal motion by defense counsel. The motion was filed because the State disclosed as a potential witness a former client of defense counsel for Jones. 185 Ariz. at 482, 917 P.2d at 211. The court found no error because neither party called the witness at trial. *Id.* Thus, no conflict of interest developed. *Id.* The court further held that if Jones was "arguing that defense counsel's decision not to call [the witness] to testify was ineffective assistance of counsel, he must do so in a proceeding for post-conviction relief."[5] *Id.*

¶25 Because Kozakeiwicz was not called as a witness in this case, no conflict of interest actually arose. However, Tucker argues that Kozakeiwicz was not called as a witness because Clark chose not to investigate the possibility of naming Kozakeiwicz as a third-party defendant because of a conflict of interest. Tucker claims that despite Kozakeiwicz being an obvious third-party defendant, Clark avoided investigating the defense because the ethical rules prevented him from doing so.

¶26 This argument presents two problems. First, there is no record of why Clark did not pursue a third-party defense. He may not have pursued the defense because of the potential ethical concerns of implicating a former client. On the other hand, he may not have pursued such a defense because he and his client decided that the

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[5] The witness might have corroborated Jones's self-defense claim as to one victim, and his claim that someone else killed the other victim. *Jones*, 185 Ariz. at 482, 917 P.2d at 211.

evidence would not have supported the defense.[6] Why Clark did not pursue a third-party defense can only be developed at an evidentiary hearing in a post-conviction relief proceeding. *See id.* at 482-83, 917 P.2d at 211-12 (citing *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989)); *see also State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) ("We reiterate that ineffective assistance of counsel claims are to be brought during Rule 32 proceedings. Any such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit."). To that extent, *Jones* controls the resolution of this issue.

¶27 The second reason Tucker's argument fails on this record is that the evidence supporting a third-party defense is not so compelling that we can conclude, as a matter of law, that Clark's failure to pursue the defense demonstrates that he was laboring under an actual conflict of interest that had an adverse effect on his performance.

¶28 In Arizona, to have a viable third-party defense, the defendant must establish that the evidence of third-party responsibility is relevant and admissible under Arizona Rules of Evidence 401, 402, and 403. *State v. Gibson,* 202 Ariz. 321, 323- 24, ¶¶ 15-16, 44 P.3d 1001, 1003-04 (2002). To be relevant, evidence must tend to prove or disprove a fact that is of consequence to the case. Ariz. R. Evid. 401. The fact of consequence is the identity of the killer of AnnMarie and Roscoe Merchant and Cindy Richards. Evidence that Kozakiewicz could have been the killer would be relevant to that issue. In *Gibson*, this court stated that for evidence related to a third-party defense to be relevant it "need only *tend* to create a reasonable doubt as to the defendant's guilt." 202 Ariz. at 324, ¶ 16, 44 P.3d at 1004.

¶29 The evidence Tucker offers that Kozakiewicz might be the killer is the following: He knew all of the victims in this case; he did not like

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[6] Before trial, the trial court ordered that fingerprints be retaken from Kozakeiwicz. Apparently, the results of comparisons of his prints with latent prints from the crime scene were negative because the parties entered into a stipulation regarding identification of the latent prints found at the crime scene.

Roscoe; he did not like blacks;[7] he had spoken derogatorily of Roscoe and blacks in general; he had access to guns; he gave Tucker one of his three sets of handcuffs; and he had pled guilty to another murder that occurred two months before the murders in this case.

¶30 Tucker cites *State v. Prion,* 203 Ariz. 157, 52 P.3d 189 (2002), as supporting the proposition that "evidence [that] consisted of the defendant and another person being acquainted" was sufficiently relevant to meet the *Gibson* standard. We disagree for two reasons. First, Tucker misconstrues the holding in *Prion.* Second, the evidence in *Prion* was far more extensive than that presented in this case. *See* 203 Ariz. at 161, ¶ 23, 52 P.3d at 193.

¶31 *Prion* held that evidence that another person committed the crimes is admissible if it "supports the notion that [the third-party] had the *opportunity and motive* to commit this crime." *Id.* at 161, ¶ 24, 52 P.3d at 193 (emphasis added). The evidence in *Prion* consisted in part of the following: The third-party defendant was a co-worker of the victim at a restaurant; on the day the victim disappeared he had rented a new apartment that was close to both a night club where he also worked and the location at which the victim's car was found after her disappearance; he was working at the night club the night the victim disappeared; and the doorman at the night club said the victim was let into the club on the night she disappeared specifically to see the third-party defendant. *Id.* at 161, ¶ 23, 52 P.3d at 193.

¶32 The evidence Tucker offers only minimally indicates that Kozakiewicz had motive, albeit the same motive as perhaps dozens of other people who were acquainted with the Merchant family. But, unlike in *Prion*, Tucker does not point to any evidence showing that Kozakiewicz had the opportunity to kill the Merchants. Without some evidence tending to connect Kozakiewicz to the crime scene, Tucker's speculation that Kozakiewicz might have been the killer is arguably irrelevant, and therefore would likely have been found inadmissible.

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[7] Tucker is black and AnnMarie and Roscoe were bi-racial (black and white).

¶33 Accordingly, Tucker's claim that his right to the assistance of conflict-free counsel, *see Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948), was violated is not supported by this record. He has not shown that Clark labored under an actual conflict of interest, and he has not shown that Clark's decision not to pursue a third-party defense was motivated by concerns of violating the ethical rules. Thus, any claim that Clark was ineffective in not calling Kozakiewicz to testify or investigating him in the first instance must be presented in a petition for post-conviction relief. *Spreitz*, 202 Ariz. at 3, ¶ 9, 39 P.3d at 527. The trial court therefore did not abuse its discretion in denying the State's motion to determine counsel.

¶34 Tucker next argues that even if the conflict of interest did not rise to the level of a Sixth Amendment violation, this court should remand for a new trial because of the appearance of impropriety. *See Gomez v. Superior Court*, 149 Ariz. 223, 225-26, 717 P.2d 902, 904-05 (1986).

¶35 In *Gomez*, we held that while the appearance of impropriety was no longer a standard in the Arizona Rules of Professional Conduct, it still remains a valid claim for purposes of disqualification of an attorney. *Id.* We listed four factors for consideration when disqualification of an attorney is sought on the basis of the appearance of impropriety:

> (1) whether the motion is being made for the purpose[] of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation.

Id. at 226, 717 P.2d at 905 (citing *Alexander v. Superior Court*, 141 Ariz. 157, 165, 685 P.2d 1309, 1317 (1984).

¶36 Tucker's only argument here focuses on the fourth factor. He contends that Clark's decision to forgo a third-party defense because it would implicate a former client engenders "public mockery of our criminal justice system, especially when it comes to lawyers representing capital clients." This argument presupposes that Tucker had a viable third-party defense. But as discussed above, the record does not support that presupposition. Thus, this argument fails.

¶37 Finally, Tucker argues that the doctrine of judicial estoppel should prohibit the State from taking a position on appeal that is contrary to the position it asserted at trial. This court has held that to establish a claim for the application of judicial estoppel, "(1) the parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding." *State v. Towery,* 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996) (citation omitted). Tucker fails to note that while the parties and the issue are the same, the State was not successful in asserting its position in the trial court. The State asserted that Clark's conflict of interest in this case was so serious that it could not be waived and thus Clark could not serve as Tucker's counsel. The State's motion was denied. As such, the State is not estopped from asserting its position on appeal.

B.

¶38 Tucker argues that the trial court erred in admitting testimony from Cassandra Barnes (Cassie) regarding a telephone conversation she had with AnnMarie on July 13, 1999. Specifically, Tucker objects to the admission of Cassie's testimony that AnnMarie told her in that conversation that Tucker was upset with her and verbally abusive toward her.[8] Cassie testified that AnnMarie called her that evening and sounded as though she was upset and crying. AnnMarie told her that she had "just got[ten] off the phone" with Tucker, that he had asked her to come to his house, and when she had refused, he got upset and called her names.

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[8] Tucker admittedly called AnnMarie "worthless" and a "fat-ass."

¶39 After a hearing on this issue, the court admitted Cassie's testimony about AnnMarie's statements from not only the July 13th conversation, but also two other statements from a July 14th conversation. The court relied upon three different exceptions to the rule against hearsay: present sense impression, Ariz. R. Evid. 803(1); excited utterance, Ariz. R. Evid. 803(2); and state of mind, Ariz. R. Evid. 803(3).

¶40 The July 14 conversation included a statement by AnnMarie that Tucker was upset with her, as well as a statement that she wanted nothing more to do with Tucker.[9] Tucker does not contest the admission of the two statements from the July 14 conversation. Rather, Tucker contends that the court erred in admitting the statements from the July 13 conversation that he was upset with AnnMarie and had called her names. He claims that it was error to admit the statements under any exception to the rule against hearsay.

¶41 The Arizona Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). To be admissible, a court must find that the out-of-court statement fits within one of the many exceptions to the rule against hearsay. *State v. Bass,* 198 Ariz. 571, 577, ¶ 20, 12 P.3d 796, 802 (2000). We review admissions of evidence under exceptions to the rule against hearsay for abuse of discretion. *State v. Robinson,* 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990); *State v. Adamson,* 136 Ariz. 250, 255, 665 P.2d 972, 977 (1983)(citation omitted). We conclude that the trial court did not abuse its discretion in admitting the statement

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[9] During the July 14 conversation, while Cassie was talking to AnnMarie, AnnMarie received a call on the other line. She used call waiting to take the other call while Cassie waited on the other line. When AnnMarie returned to the line to talk to Cassie, she said that Tucker had been the caller on the other line and that he had been upset with her and that she wanted nothing more to do with him. The court admitted AnnMarie's statements that Tucker was upset with her under the present sense impression and excited utterance exceptions to the rule against hearsay. *See* Ariz. R. Evid. 803(1) & (2). The court admitted AnnMarie's statement that she wanted nothing more to do with Tucker as a statement of her then existing state of mind. *See* Ariz. R. Evid. 803(3).

under
Rule 803(1). Thus, we find it unnecessary to decide whether the statement was admissible under Rule 803(2) or 803(3).

¶42 Rule 803(1), Ariz. R. Evid., defines a present sense impression as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." The theory behind this exception "is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." Joseph M. Livermore et al., *Arizona Practice: Law of Evidence* 346 (4th ed. 2000)(citation omitted); *see also* 5 *Weinstein's Federal Evidence* § 803.03[1] (2d ed. 2002) (noting that present sense impressions are "highly trustworthy because: 1. the statement is simultaneous with the event, thus, there is no memory problem; 2. there is little or no time for calculated misstatement; and 3. the statement is usually made to one who has equal opportunity to observe and check misstatements"). Statements of present sense impressions are deemed reliable because they are made close in time to the events they describe. *See* Livermore et al., *supra,* at 346. The more time that elapses between the event and the statement, the stronger the possibility that a declarant will attempt, either consciously or subconsciously, to alter his or her description of the event. *See id.* We assume, as a general matter, that when the declarant has had little time to reflect on the event she has perceived, her statement will be spontaneous and therefore reliable. *See id.*

¶43 The present sense impression exception has three requirements. *State v. Romanosky,* 162 Ariz. 217, 222 n.5, 782 P.2d 693, 698 n.5 (1989). The statement must describe an event or condition, that was perceived by the declarant, and the statement must be made immediately after the event. *Id.*

¶44 There is no dispute that AnnMarie's statements to Cassie describe an event that AnnMarie perceived. The issue here is the lapse of time between the perception and the statement. Specifically, Tucker argues that AnnMarie did not make her statement to Cassie "immediately" after she perceived Tucker's statement, as is required by Rule 803(1).

While Cassie testified that, in the July 13 conversation, AnnMarie said, "she had just hung up" with Tucker, Cassie admitted she did not know exactly when Tucker and AnnMarie spoke that day.

¶45 The phrase "just hung up" could have a variety of meanings. To some it might denote a lapse of mere seconds, and to others the passage of a longer time. Rule 803(1) requires some degree of contemporaneity between the event and the statement. How much contemporaneity has never been specified because every case is decided on its individual facts. *See* Livermore et al., *supra,* at 346 (citing cases). The admissibility of such statements must be judged on the totality of the circumstances. *State v. Barnes,* 124 Ariz. 586, 589-90, 606 P.2d 802, 805-06 (1980).

¶46 That Cassie could not say that AnnMarie's statements were made "immediately" after her conversation with Tucker does not necessarily make the statements inadmissible. Trial courts have some latitude in finding whether a statement was made immediately after the event. *See, e.g., United States v. Parker,* 936 F.2d 950, 954 (7th Cir. 1991) (holding railroad worker's statement to police, made after he had walked approximately 100 feet, admissible as a present sense impression); *United States v. Blakey,* 607 F.2d 779, 786 (7th Cir. 1979) (holding statement made twenty-three minutes after event admissible as a present sense impression), *overruled on other grounds, Idaho v. Wright,* 497 U.S. 805 (1990). We agree with Tucker that the dictionary definitions of the terms "just" and "immediate" differ slightly. However, while "just hung up" may denote a variety of time frames, the phrase normally denotes a short period of time.

¶47 The trial court observe Cassie while she testified during the hearing. Thus, it was in a better position than are we to find that Cassie would have understood what AnnMarie meant by "just hung up." Accordingly, we cannot say the trial court abused its discretion in determining that, in this instance, "just hung up" implied the sort of contemporaneity required by Arizona Rule of Evidence 803(1).

C.

¶48 Tucker contends that the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), overruled the holding in *Schad v. Arizona*, 501 U.S. 624 (1991). *Schad* held that jury unanimity is not required on which theory of first degree murder the jury convicted. *Id.* @ 645.

¶49 The State offered alternative theories on which the jury could have found Tucker guilty of the first degree murder of AnnMarie. The jury could have found either that Tucker had committed first degree murder by premeditation, or that he had committed felony murder. Because there were alternative theories, the court gave the jury a verdict form that required them to record how many jurors voted for each alternative. All twelve members of the jury found Tucker guilty of premeditated murder. However, only eleven jurors voted in favor of felony murder. Tucker argues that because the jury was not unanimous on the felony murder theory, his sentence as to that murder count must be vacated.

¶50 There is only a single crime of first degree murder. *State v. Arnett*, 158 Ariz. 15, 19, 760 P.2d 1064, 1068 (1988). Felony murder is not a separate offense, *id.*, as Tucker appears to argue. That felony murder and premeditated murder contain different elements does not make them different crimes, rather they are simply two forms of first degree murder. *Id.*

¶51 Tucker's argument that *Apprendi* overrules the holding in *Schad* is meritless. *Schad* held that jurors need not be unanimous as to a single theory of murder so long as they all agree that first degree murder was committed, whether by premeditation or felony murder. 501 U.S. at 645. Here the jury unanimously found Tucker guilty of premeditated murder. Thus, it is a moot point that only eleven jurors also found Tucker guilty of first degree murder by way of felony-murder. Even if *Apprendi* did have some effect on the holding in *Schad*, it is of no consequence here because Tucker was unanimously found guilty of first degree murder on a theory of premeditation.

D.

¶52 Tucker raises a number of sentencing issues in this case. We

address only one of them because we conclude that based on our determination of that issue Tucker must be resentenced. Because Tucker will be resentenced, all other sentencing issues he raises are moot.

¶53 Tucker argues that he was deprived of his Sixth Amendment right to a jury trial on the question of his capital sentence. In *Ring v. Arizona,* 536 U.S. 584, 609 (2002) (*Ring II*), the United States Supreme Court held that Arizona's capital sentencing scheme violated the right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution. The Court declared that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. The Court reversed our decision in *State v. Ring,* 200 Ariz. 267, 25 P.3d 1139 (2001) (*Ring I*), and remanded for further proceedings consistent with its decision. *Ring II,* 536 U.S. at 609.

¶54 Following the Supreme Court's *Ring II* decision, we consolidated all death penalty cases in which this court had not yet issued a direct appeal mandate, including Tucker's, to determine whether *Ring II* required this court to reverse or vacate the defendants' death sentences. In *State v. Ring,* ___ Ariz. ___, ___, ¶ 53, 65 P.3d 915, 936 (2003) (*Ring III*), we concluded that we will examine a death sentence imposed under Arizona's superseded capital sentencing statute for harmless error. *See* A.R.S. § 13-703, *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

¶55 In Tucker's case, the trial court found three aggravating factors: (1) "In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense," A.R.S. § 13-703(F)(3); (2) "The defendant committed the offense in an especially heinous, cruel or depraved manner," A.R.S. § 13-703(F)(6); and (3) "The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense," A.R.S. § 13-703(F)(8). Based on our decision in *Ring III,*

none of the aggravating factors found in Tucker's case fall outside the *Ring II* mandate. *See Ring III,* ___ Ariz. at ___, ¶¶ 54-86, 65 P.3d at 936-42. Therefore, we must analyze each of Tucker's aggravating factors for harmless error. To determine whether allowing the trial judge, rather than a jury, to find the presence of the aggravating factors was harmless error we must find, beyond a reasonable doubt, that no reasonable jury could have come to a different conclusion than the trial judge. *See State v. Bible,* 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (discussing harmless error).

¶56 The trial court based its finding of the (F)(3) aggravator on the fact that Tucker had killed all the members of the Merchant household and left Cindy's infant son alone in his crib with no means of caring for himself. The court found that because the crib was near the head of the bed in which Roscoe and Cindy were killed, Tucker must have known of the infant's presence and should have known that leaving the infant alone in the house created a grave risk of death to the child. We conclude the error here was not harmless.

¶57 The statute requires the fact finder to determine that the defendant "knowingly created a grave risk of death." A.R.S. §13-703(F)(3). While we believe a reasonable jury could have inferred that Tucker knew the child was in the room, we cannot say that any reasonable jury would also have found that Tucker knowingly placed the baby in danger of death, or indeed that he knew that leaving the child alone created a grave risk of death.

¶58 In past cases involving this aggravator, this court has found a defendant created a grave risk of death to bystanders by firing a gun indiscriminately or setting fire to a building the defendant knew was occupied. *See, e.g., State v. Vickers,* 159 Ariz. 532, 546, 768 P.2d 1177, 1191 (1989) (setting fire to an inmate in his cell, thus endangering nearby inmates trapped in their cells); *State v. McMurtrey,* 151 Ariz. 105, 108, 726 P.2d 202, 205 (1986) (shooting victims in a crowded bar); *State v. Ortiz,* 131 Ariz. 195, 209, 639 P.2d 1020, 1034 (1982) (setting fire to the victim's house while her children were inside); *State v. Doss,* 116 Ariz. 156, 163, 568 P.2d 1054, 1061 (1977) (shooting a

victim in a crowded gymnasium). Generally, our decisions have held that a third party must be in the zone of danger *during* the murderous attack to be placed at grave risk of death. *State v. Wood,* 180 Ariz. 53, 69, 881 P.2d 1158, 1174 (1994). Here, the infant's life was placed in danger as a result of Tucker's crimes, but there was no evidence introduced that the infant was in any danger during the attacks.

¶59 The State's theory of grave danger in this case appears to be based on the fact that an infant left alone creates a risk the infant will die of dehydration or perhaps heat stroke.[10] For Tucker's actions to have been knowing, there would have to be some evidence that Tucker knew the child would be left alone for a very long time. We find nothing in the record to support that conclusion. Thus, we cannot conclude beyond a reasonable doubt that any reasonable jury would have found either that Tucker knowingly placed the infant at grave risk of death, or alternatively, that the risk of death to the child was present during Tucker's murderous attacks on the other three victims.

¶60 The (F)(6) aggravator was found with respect to each of the victims. As to AnnMarie, the court found her murder was especially cruel. Because the (F)(6) aggravator is phrased "in the disjunctive, a finding of either cruelty or heinouness/depravity will suffice to establish this factor." *State v. Djerf,* 191 Ariz. 583, 595, ¶ 44, 959 P.2d 1274, 1286 (1998). "A murder is especially cruel if the victim consciously suffers physical or mental anguish." *Id.* at 595, ¶ 45, 959 P.2d at 1286 (citation omitted). And such suffering must be reasonably foreseeable. *Id.*

¶61 The evidence in this case showed that AnnMarie was raped, beaten, strangled, and then shot. The police testified that the disarray of the room and the various locations of blood spatter patterns and blood pools indicated there was a prolonged struggle in the room. While the medical examiner could not be certain about AnnMarie's state of

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[10] There was also some mention of the fact that the door to the apartment was left open. While theoretically this placed the life of the child at risk we find it difficult to say that created a grave risk of death.

consciousness during the attack, that she had been handcuffed at some point during her ordeal indicates she was conscious for at least some period as there would be little point in subduing an unconscious victim. The extent of AnnMarie's injuries indicates that she suffered physically. And the circumstances of her murder clearly demonstrate that it was reasonably foreseeable she would suffer. Accordingly, we conclude that no reasonable jury could have found the murder of AnnMarie was anything but especially cruel.

¶62 The trial court also found the murder of AnnMarie was heinous and depraved. Because we have found harmless the *Ring II* error that the murder of AnnMarie was especially cruel, it is unnecessary for us to reach the question of whether her murder was also heinous and depraved. *Id.* at 595, ¶ 44, 959 P.2d at 1286.

¶63 The trial court found the murders of Roscoe and Cindy were heinous and depraved because of the helplessness of the victims. The trial court theorized that they were killed for the purpose of witness elimination. In *Djerf,* we stated there are five factors that may indicate a murder was heinous or depraved. 191 Ariz. at 597, ¶ 53, 959 P.2d at 1288. The factors include: "(1) relishing the murder, (2) inflicting gratuitous violence, (3) victim mutilation, (4) senselessness of the crime, and (5) helplessness of the victim." *Id.* (citations omitted). In *State v. King,* 180 Ariz. 268, 285, 883 P.2d 1024, 1041 (1994), we held that the (F)(6) aggravator cannot be sustained solely on the basis that a defendant killed to eliminate witnesses. We concluded that witness elimination could be a factor in finding that a murder was heinous and depraved, but it could not be the only factor. *Id.*

¶64 The purpose of aggravating factors is to distinguish murders that are beyond the norm of first degree killings. *See id.* at 287, 883 P.2d at 1043. While any murder is tragic and senseless in its own way, it is debatable whether the execution style murder of two sleeping victims is heinous and depraved. Thus, we cannot find beyond a reasonable doubt that no jury could have found the murders of Roscoe and Cindy were anything but heinous and depraved

¶65 Finally, the trial court found the (F)(8) aggravator in this case because Tucker committed multiple homicides in connection with his crimes. As we said in *Ring III,* this aggravator is subject to harmless error analysis. ___ Ariz. at ___, ¶¶ 80-82, 65 P.3d at 941-42. But it is not enough that the jury found the defendant guilty of multiple homicides. The (F)(8) aggravating factor is only properly applicable when there is evidence that all the killings took place during "a continuous course of criminal conduct." *State v. Rogovich,* 188 Ariz. 38, 45, 932 P.2d 794, 801 (1997). The fact-finder must determine that there was a "temporal, spatial, and motivational relationship[] between the capital homicide and the collateral [homicide]." *Id.* (quoting *State v. Lavers,* 168 Ariz. 376, 393, 814 P.2d 333, 350 (1991)).

¶66 The murders in this case all occurred in the same apartment, which clearly indicates a spatial relationship. The State theorized Roscoe and Cindy were killed to eliminate them as possible witnesses. While a jury may have found Tucker's motivation was something different, it is difficult to imagine a motive for the killings unrelated to the murder of AnnMarie. Based on the evidence offered at trial, any error as to the (F)(8) aggravator was harmless because we believe that no reasonable jury could have found differently than the trial judge.

¶67 Our inquiry must also consider whether reversible error occurred with respect to the mitigating circumstances. *Ring III,* ___ Ariz. at ___, ¶ 89, ___, ¶ 104, 65 P.3d at 943, 946. As discussed earlier, Tucker presented as mitigating factors his age, rehabilitation potential, good character, and lack of prior criminal history. The trial court found Tucker's age and lack of prior criminal history to be mitigating factors. But on this record, we cannot conclude that a reasonable jury would not also have found as mitigating factors Tucker's good character and rehabilitation potential. Tucker presented evidence on these factors through testimony from his mother. While the trial court implicitly found the witness unbelievable, a jury could reach an opposite conclusion. Thus, we cannot say that if a jury heard the same evidence as the trial judge, it would reach the same conclusions with respect to the mitigating factors.

¶68 In sum, while the error as to some of the aggravating factors found by the trial court was harmless, we cannot say beyond a reasonable doubt that a jury, presented with the same evidence, would have found that the (F)(3) aggravator or the (F)(6) aggravator as to Roscoe and Cindy had been proven beyond a reasonable doubt. Nor on this record can we say that a jury would have assessed the mitigating evidence as did the trial judge. Therefore, we must remand this case for resentencing under A.R.S. sections 13-703 and -703.01 (Supp. 2002).

III. CONCLUSION

¶69 For the foregoing reasons, we affirm Tucker's convictions on the three counts of first degree murder and his convictions and sentences on the non-capital offenses. We remand Tucker's death sentences for resentencing.

Michael D. Ryan, Justice

CONCURRING:

Ruth V. McGregor, Vice Chief Justice
Rebecca White Berch, Justice
Robert J. Corcoran, Justice (Retired)*

Jones, C.J., concurring in part, dissenting in part:

¶70 I concur in all aspects of today's opinion pertaining to Tucker's convictions and sentences with the sole exception that I dissent from the majority's use of harmless error analysis of capital sentencing determinations made by the trial judge in the absence of the jury. In the aftermath of the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) (*Ring II*), it is my view that the absence of the jury in the sentencing phase of a capital trial amounts to structural error. The right to jury trial is fundamental. Where a judge, not a jury determines sentencing issues, a violation of the Sixth Amendment of the Constitution of the United States, requiring trial by an impartial

jury, has occurred. I would remand the case for resentencing, simply on the basis of the Sixth Amendment violation. *See State v. Ring*, ___ Ariz. ___, ___, ¶¶ 105-14, 65 P.3d 915, 946-48 (2003) (Feldman, J., concurring in part, dissenting in part) (*Ring III*).

Charles E. Jones, Chief Justice

* Due to a vacancy on the court, Retired Justice Corcoran was designated to sit on this case pursuant to Article 6, Section 3, of the Arizona Constitution.

APPENDIX B

[Filed April 3, 2003]

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, v. TIMOTHY STUART RING, Appellant.	)	Arizona Supreme Court No. CR-97-0428-AP Maricopa County Superior Court No. CR-95-01754(A) CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. ANTOIN JONES, Appellant.	)	Arizona Supreme Court No. CR-99-0536-AP Maricopa County Superior Court No. CR-96-04691 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. DANNY N. MONTAÑO, Appellant.	)	Arizona Supreme Court No. CR-99-0439-AP Pima County Superior Court No. CR-58016 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. WAYNE BENOIT PRINCE, Appellant.	)	Arizona Supreme Court No. CR-00-0328-AP Maricopa County Superior Court No. CR 98-04885 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. MICHAEL GENE BLAKLEY, Appellant.	)	Arizona Supreme Court No. CR-00-0360-AP Mohave County Superior Court No. CR-98-838 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. HENRY WILLIAM HALL, Appellant.	)	Arizona Supreme Court No. CR-00-0447-AP Maricopa County Superior Court No. CR1997-011695 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. SHAWN RYAN GRELL, Appellant.	)	Arizona Supreme Court No. CR-01-0275-AP Maricopa County Superior Court No. CR1999-095294 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. JAMES EDWARD DAVOLT, II, Appellant.	)	Arizona Supreme Court No. CR-00-0508-AP Mohave County Superior Court No. CR-98-1243 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. LEROY D. CROPPER, Appellant.	)	Arizona Supreme Court No. CR-00-0544-AP Maricopa County Superior Court No. CR97-03949 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. SHAD DANIEL ARMSTRONG, Appellant.	)	Arizona Supreme Court No. CR-00-0595-AP Pima County Superior Court No. CR-61846 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. EUGENE ROBERT TUCKER, Appellant.	)	Arizona Supreme Court No. CR-01-0091-AP Maricopa County Superior Court No. CR1999-015293 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. KAJORNSAK PRASERTPHONG, Appellant.	)	Arizona Supreme Court No. CR-01-0100-AP Pima County Superior Court No. CR-64663 CONSOLIDATED WITH
STATE OF ARIZONA,	)	Arizona Supreme Court No. CR-01-0103-AP

Appellee,	)	
	)	Pima County Superior
v.	)	Court
	)	No. CR-64663
CHRISTOPHER BO HUERSTEL,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-01-0129-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR1997-05555
SHERMAN LEE RUTLEDGE,	)	
	)	
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-01-0270-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR1996-011714
CHRISTOPHER GEORGE THEODORE LAMAR,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-01-0421-AP

Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR1995-006472
MICHAEL JOE MURDAUGH (A),	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-02-0042-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR-1999-003536
BRIAN JEFFREY DANN,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-02-0044-AP
Appellee,	)	
	)	Pima County Superior
v.	)	Court
	)	No. CR-43804
ROBERT JOE MOODY,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-99-0296-AP
Appellee,	)	

v.	)	Pima County Superior Court No. CR-61452
KEITH ROYAL PHILLIPS, Appellant.	)	CONSOLIDATED WITH
STATE OF ARIZONA, Appellee,	)	Arizona Supreme Court No. CR-99-0551-AP
v.	)	Pima County Superior Court No. CR-61452
MARCUS LASALLE FINCH, Appellant.	)	CONSOLIDATED WITH
STATE OF ARIZONA, Appellee,	)	Arizona Supreme Court No. CR-99-0438-AP
v.	)	Maricopa County Superior Court No. CR-98-003520
JOHN EDWARD SANSING, Appellant.	)	CONSOLIDATED WITH
STATE OF ARIZONA, Appellee,	)	Arizona Supreme Court No. CR-98-0289-AP
	)	Maricopa County Superior

v.	)	Court
	)	No. CR-95-09046
JAMES CORNELL HARROD,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-98-0376-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR-93-08116
DARREL PETER PANDELI aka	)	
DARREL PETER FLORIAN,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-97-0317-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR 92-05731
SCOTT ALAN LEHR,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-98-0488-AP
Appellee,	)	
	)	Pinal County Superior
v.	)	Court

ARTURO ANDA CAÑEZ, Appellant.	)	No. CR-96-021235 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. AARON SCOTT HOSKINS, Appellant.	)	Arizona Supreme Court No. CR-97-0349-AP Maricopa County Superior Court Nos. CR-94-11396 and CR-94-11397 (Consolidated) CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. SCOTT DOUGLAS NORDSTROM, Appellant.	)	Arizona Supreme Court No. CR-98-0278-AP Pima County Superior Court No. CR-55947 **OPINION**

Appeal from the Superior Court of Maricopa County
No. CR-95-01754(A)
The Honorable Gregory H. Martin, Judge

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Appeal from the Superior Court of Maricopa County
No. CR-96-04691
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Pima County
No. CR-58016
The Honorable Deborah J. S. Ward, Judge Pro Tempore

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Appeal from the Superior Court of Maricopa County
No. CR 98-04885
The Honorable Michael R. McVey, Judge

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Appeal from the Superior Court of Mohave County
No. CR-98-838
The Honorable Steven F. Conn, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1997-011695
The Honorable Thomas W. O'Toole, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1999-095294
The Honorable Barbara M. Jarrett, Judge

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Appeal from the Superior Court of Mohave County
No. CR-98-1243
The Honorable Steven F. Conn, Judge

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Appeal from the Superior Court of Maricopa County
No. CR97-03949
The Honorable David R. Cole, Judge

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Appeal from the Superior Court of Pima County
No. CR-61846

The Honorable Howard Hantman, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1999-015293
The Honorable Michael D. Jones, Judge

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Appeal from the Superior Court of Pima County
No. CR-64663
The Honorable Michael Brown, Judge

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Appeal from the Superior Court of Pima County
No. CR-64663
The Honorable Michael Brown, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1997-05555
The Honorable Frank T. Galati, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1996-011714
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1995-006472
The Honorable Sherry Hutt, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 1999-003536
The Honorable H. Jeffrey Coker, Judge

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and

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Appeal from the Superior Court of Pima County
No. CR-43804
The Honorable Michael Cruikshank, Judge

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Appeal from the Superior Court of Pima County
No. CR-61452
The Honorable Bernardo P. Velasco, Judge

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and James P. Beene, Assistant Attorney General
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Appeal from the Superior Court of Pima County
No. CR-61452
The Honorable Bernardo P. Velasco, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 98-003520
The Honorable Ronald S. Reinstein, Judge

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Appeal from the Superior Court of Maricopa County
No. CR-95-09046
The Honorable Ronald S. Reinstein, Judge

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Appeal from the Superior Court of Maricopa County
No. CR-93-08116
The Honorable Gregory H. Martin, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 92-05731
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Pinal County
No. CR-96-021235
The Honorable Boyd T. Johnson, Judge

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Attorneys for Arturo Anda Cañez

Appeal from the Superior Court of Maricopa County
Nos. CR-94-11396 and CR-94-11397 (Consolidated)
The Honorable Jeffrey A. Hotham, Judge

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Appeal from the Superior Court of Pima County
No. CR-55947
The Honorable Michael Cruikshank, Judge Pro Tempore

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M c G R E G O R, Vice Chief Justice

¶1 This case comes to us on remand from the United States Supreme Court, *Ring v. Arizona*, 536 U.S. 584, ___, 122 S. Ct. 2428, 2443 (2002) (*Ring II*). We have jurisdiction pursuant to the Arizona Constitution, Article VI, Section 5.3.

I.
Facts and Procedural History.

¶2 On December 6, 1996, a jury convicted Timothy Stuart Ring of first degree murder, conspiracy to commit armed robbery, armed robbery, burglary and theft. Under Arizona law at the time of Ring's sentencing, capital sentencing followed the procedure set forth at Arizona Revised Statutes (A.R.S.) section 13-703 (Supp. 1996). As required by A.R.S. section 13-703.B, the trial court conducted a sentencing hearing to consider aggravating and mitigating circumstances. The court could consider only those aggravating factors identified by statute, but could

consider any possible mitigating factor.[1] A.R.S. § 13-703.F–.G, *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1. After the hearing, the court found two aggravating factors: Ring committed the murder for pecuniary gain, A.R.S. section 13-703.F.5, and "in an especially heinous, cruel or depraved manner," A.R.S. section 13-703.F.6. *State v. Ring*, 200 Ariz. 267, 272 ¶ 13, 25 P.3d 1139, 1144 (2001) (*Ring I*). The trial court concluded that the mitigating circumstance of Ring's minimal criminal record was not "sufficiently substantial to call for leniency" and sentenced Ring to death. *Id.* at 273 ¶ 13, 25 P.3d at 1145; *see* A.R.S. § 13-703.E, *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

¶3 Ring subsequently filed a direct appeal to this court seeking review of multiple trial and sentencing issues, including a Sixth Amendment challenge to Arizona's capital sentencing procedure. The Sixth Amendment right to a jury trial, Ring argued, requires a jury, rather than a judge, to find the aggravating factors set forth at section 13-703.F. *Ring I,* 200 Ariz. at 278 ¶ 40, 25 P.3d at 1150. This court affirmed Ring's first degree murder conviction and death sentence. *Id.* at 284 ¶ 65, 25 P.3d at 1156. Guided by the United States Supreme Court's decision in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), we held Arizona's capital sentencing procedure did not violate the Sixth Amendment of the United States Constitution. *Ring I*, 200 Ariz. at 279-80 ¶ 44, 25 P.3d at 1151-52.

¶4 Ring petitioned the United States Supreme Court to accept

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[1] The state must prove aggravating factors beyond a reasonable doubt. A.R.S. § 13-703.B (Supp. 2002); *State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997). Mitigating factors must be proved by a preponderance of the evidence. A.R.S. § 13-703.C; *State v. Pandeli*, 200 Ariz. 365, 376 ¶ 44, 26 P.3d 1136, 1147 (2001). Except for one brief period, aggravating circumstances have been codified at A.R.S. section 13-703.F since the legislature enacted judge-based sentencing. Following the 2001 Arizona Legislative Session, these aggravating circumstances are listed under A.R.S. section 13-703.G. 2001 Ariz. Sess. Laws ch. 260, § 1. The legislature redesignated aggravating circumstances under subsection .F in its post-*Ring II* amendments. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

certiorari. The Court granted review and held that Arizona's capital sentencing scheme violated the Sixth Amendment right to a jury trial, overruling *Walton* and applying the approach of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. The Supreme Court remanded the matter for disposition in light of *Ring II*.

¶5 At the time of the *Ring II* decision, thirty-one defendants sentenced to death had matters pending on direct appeal before this court. On June 27, 2002, we entered an order consolidating all thirty-one death penalty cases then on direct appeal. *State v. Ring*, Order No. CR-97-0428-AP (June 27, 2002).

¶6 All defendants in this consolidated case either pled guilty to or were convicted by a jury of first degree premeditated or felony murder. Trial judges sentenced all defendants to death under a now-superseded version of A.R.S. section 13-703, under which a judge considered aggravating and mitigating evidence. This court must now examine the impact of *Ring II* on the death sentences of those defendants before us. To assist the court, and after consultation with counsel for the State and the defendants, we ordered the parties to brief the issues discussed below. We reserved to each defendant the right to further brief sentencing issues, if necessary. This opinion addresses those issues raised in the consolidated appeal. The court will address each defendant's sentencing issues in a separate opinion.

II.

Historical Overview of Capital Punishment in Arizona.

¶7 Under Arizona's first penal code, a person convicted of first degree

murder received either a death or prison sentence.[2] Revised Statutes of Arizona, Penal Code § 173 (1913). The jury, exercising its discretion, decided which punishment to impose. *Id.* In 1918, voters approved an initiative measure giving the trial judge authority to sentence a person to death for first degree murder in cases in which the defendant pled guilty. 1919 Ariz. Sess. Laws, Initiative & Referendum Measures 17, 18. In those cases, the trial court exercised the same discretion as did a jury. Thus, until the early 1970s, Arizona imposed the death penalty for first degree murder at the sole discretion of the jury or court. *E.g.*, Ariz. Code § 43-2903 (1939); Ariz. Code § 4585 (1928); *State v. McGee*, 91 Ariz. 101, 111-12, 370 P.2d 261, 268 (1962) ("The determination of punishment is wholly within the discretion of the jury upon their consideration of all aspects of the case."), *superseded by statute as stated in State v. Lopez*, 163 Ariz. 108, 115, 786 P.2d 959, 966 (1990); *Hernandez v. State*, 43 Ariz. 424, 429, 32 P.2d 18, 20 (1934) ("[T]he question of punishment in first degree murder cases is wholly within the jury's discretion . .. ."). No statutory standards guided the determination of punishment.

¶8 In 1972, however, the United States Supreme Court decided *Furman v. Georgia* and held that standardless death sentencing procedures violate the Eighth Amendment's prohibition of cruel and unusual punishment. 408 U.S. 238, 239-40, 92 S. Ct. 2726, 2727 (1972) (per curiam). According to Justice Stewart, complete jury discretion led to arbitrary and capricious imposition of the death sentence; given strikingly similar crimes, some defendants received a death sentence and others did not. *Id.* at 309-10, 92 S. Ct. at 2762 (Stewart, J., concurring).

¶9 Following the *Furman* decision, the Arizona Legislature enacted a new capital sentencing scheme. 1973 Ariz. Sess. Laws ch. 138. The legislation divided a capital first degree murder trial into two phases: a

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[2] In addition to first degree murder, offenses punishable by death included treason, Revised Statutes of Arizona, Penal Code section 33 (1913), train robbery, *id.* sections 435, 438, and deadly assault by a felon serving a life sentence, *id.* section 220.

guilt phase and a sentencing phase. Upon a jury conviction of or a guilty plea to first degree murder, the statutes required the trial court to hold a sentencing hearing at which the state and defendant presented evidence of statutorily defined aggravating and mitigating factors.[3] *Id.* § 5. The trial court could impose the death sentence if it found at least one aggravating circumstance and "no mitigating circumstances sufficiently substantial to call for leniency." *Id.*

¶10 Three years later, in *Gregg v. Georgia*, the Supreme Court upheld Georgia's revised sentencing scheme against a claim that the death penalty was *per se* unconstitutional. 428 U.S. 153, 169, 96 S. Ct. 2909, 2923 (1976). The Georgia statute resembled Arizona's, except that, under Georgia law, the same jury heard both the guilt and sentencing phases. *See id.* at 164 & n.9, 96 S. Ct. at 2921 & n.9.

¶11 The Supreme Court reviewed Arizona's judge-only sentencing in *Walton*. The Court rejected an argument that the Sixth Amendment right to a jury trial required a jury, not a judge, to find the facts presented at the sentencing hearing. *Walton*, 497 U.S. at 649, 110 S. Ct. at 3055. In *Apprendi*, a non-capital case decided ten years later, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362-63. Although Justice O'Connor's *Apprendi* dissent questioned whether *Walton* could survive the *Apprendi* ruling, *id.* at 537, 120 S. Ct. at 2387-88 (O'Connor, J., dissenting), the majority distinguished capital cases as "not controlling" authority. *Id.* at 496-97, 120 S. Ct. at 2366.

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[3] In 1978, the Supreme Court held unconstitutional those death penalty sentencing statutes limiting the types of mitigating evidence a defendant can introduce. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978); *Bell v. Ohio*, 438 U.S. 637, 642, 98 S. Ct. 2977, 2980-81 (1978). This court subsequently held unconstitutional Arizona's exclusion of nonstatutory mitigating circumstances. *State v. Watson*, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978). In 1979, the Arizona Legislature amended the mitigating circumstances statute to conform with these decisions. 1979 Ariz. Sess. Laws ch. 144, § 1.

¶12 Finally, in *Ring II*, the Supreme Court expressly overruled *Walton* in favor of *Apprendi*'s Sixth Amendment approach. 536 U.S. at ___, 122 S. Ct. at 2443. According to the Court, "[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19, 120 S. Ct. at 2365 n.19). "Capital defendants, no less than non-capital defendants," the Court concluded, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at ___, 122 S. Ct. at 2432. Thus, any fact necessary to enhance the defendant's sentence beyond that authorized by the jury's guilty verdict must be found by the jury.

¶13 Following the Supreme Court's announcement of the *Ring II* decision, Governor Jane Dee Hull called a special legislative session to revise Arizona's capital sentencing provisions. On August 1, 2002, the legislature passed and Governor Hull signed into law Senate Bill ("S.B.") 1001, containing several revisions intended to conform Arizona law to the *Ring II* mandate. S.B. 1001, 45th Leg., 5th Spec. Sess. (Ariz. 2002). Under Arizona's amended sentencing procedure, the jury serving during the guilt phase of the trial also serves as the trier of fact during the sentencing phase. A.R.S. § 13-703.01.C–.D (Supp. 2002). Specifically, the jury will find and consider the effect of aggravating and mitigating circumstances and decide whether the defendant should receive a sentence of death. *Id.* § 13-703.01.D.

¶14 To determine whether we should vacate defendants' death sentences and either reduce to a life sentence or remand for resentencing under Arizona's revised procedure, we consider the following issues.

III.

Does the Ex Post Facto Clause Prohibit Resentencing Under Arizona's Amended Capital Sentencing Procedure?

¶15 The defendants argue that resentencing under A.R.S. sections 13-

703 and 13-703.01 (Supp. 2002) (the new sentencing statutes) would constitute an ex post facto violation under the United States Constitution, Article I, Section 10, Clause 1, and the Arizona Constitution, Article II, Section 25. We disagree.[4]

¶16 The ex post facto doctrine prohibits a state from "retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719 (1990). In *Dobbert v. Florida*, the Supreme Court held that ex post facto prohibitions reach only those legislative enactments that affect substantive criminal law. 432 U.S. 282, 292, 97 S. Ct. 2290, 2298 (1977). Likewise, we recently held that, under the United States and Arizona Constitutions, "[a]n *ex post facto* law is one that increases the punishment or aggravates any crime previously committed." *Zuther v. State*, 199 Ariz. 104, 111 ¶ 26, 14 P.3d 295, 302 (2000) (holding legislative amendment changing statutory computation of prisoner "gate money" not an ex post facto law because legislative purpose was not punitive).

¶17 In *Dobbert*, the Supreme Court restated the categories of laws constituting substantive changes to criminal law:

> [A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

432 U.S. at 292, 97 S. Ct. at 2298 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 68 (1925)). Thus, a legislative act affecting changes in criminal procedure, including procedural changes that disadvantage a defendant, generally does not violate the Ex Post Facto Clause. *Collins*, 497 U.S. at 45, 110 S. Ct. at 2720 ("[Procedural] refers

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[4] In *State v. Noble*, we held that we will interpret the state Ex Post Facto Clause in accord with federal precedent. 171 Ariz. 171, 173, 829 P.2d 1217, 1219 (1992). We find no reason to deviate from *Noble*.

to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes."); *State v. Mendoza*, 170 Ariz. 184, 193, 823 P.2d 51, 60 (1992) ("A defendant has no vested right in any particular mode of procedure.").

¶18 The question before us, then, is whether Arizona's new sentencing statutes worked a substantive or procedural change in the law as it existed when these murders took place. We regard three decisions as particularly instructive.

¶19 In *Dobbert*, the defendant argued that his death sentence violated the Ex Post Facto Clause. Dobbert killed his children in 1972. At that time, Florida mandated a death sentence for capital felony convictions unless the jury, in its discretion, recommended mercy to the judge. *Dobbert*, 432 U.S. at 287, 97 S. Ct. at 2295. Shortly after Dobbert murdered his children, the Supreme Court decided *Furman v. Georgia*, striking down the Georgia death sentencing statute as unconstitutional. *Id.* at 288, 97 S. Ct. at 2296. A month later, in *Donaldson v. Sack*, the Florida Supreme Court held the Florida death sentencing statute unconstitutional under *Furman*. 265 So. 2d 499, 501 (Fla. 1972). Later that year, the Florida Legislature amended the state's capital sentencing procedure to comply with *Furman* and *Donaldson*. *Dobbert*, 432 U.S. at 288, 97 S. Ct. at 2296. Dobbert was then tried and sentenced to death under the state's new law. *Id.* at 284, 97 S. Ct. at 2294.

¶20 Dobbert failed to persuade the Supreme Court that sentencing him under the amended procedures violated the Ex Post Facto Clause. The Court first limited ex post facto violations to those occurring when a statute makes criminal a previously innocent act, aggravates a crime previously committed, provides greater punishment, or changes the quantum of proof needed to convict a defendant. *Id.* at 292, 97 S. Ct. at 2298 (quoting *Beazell*, 269 U.S. at 169-70, 46 S. Ct. at 68). None of those categories applied to the Florida statute. Instead, the Court concluded, the statutory change between the two sentencing methods was "clearly procedural," and "[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached

to the crime." *Id.* at 293-94, 97 S. Ct. at 2298.

¶21 The Supreme Court also rejected an Ex Post Facto Clause challenge in *Collins v. Youngblood*, a non-death penalty case. The jury had imposed a prison sentence and a fine, the latter not authorized by law. 497 U.S. at 39, 110 S. Ct. at 2717. The Texas Court of Criminal Appeals reformed the sentence under a statute enacted after the defendant's criminal act took place. *Id.* at 40, 110 S. Ct. at 2718. The Supreme Court held that applying the sentence reform statute in the defendant's case did not violate the Ex Post Facto Clause because although the Sixth Amendment right to a jury trial is substantial, "it is not a right that has anything to do with the definition of crimes, defenses, or punishments." *Id.* at 51-52, 110 S. Ct. at 2724 (overruling *Thompson v. Utah*, 170 U.S. 343, 18 S. Ct. 620 (1898)).

¶22 In *State v. Correll*, in contrast, we found a violation of the Ex Post Facto Clause. 148 Ariz. 468, 482, 715 P.2d 721, 735 (1986), *rev'd in part on other grounds by Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998). A jury convicted the defendant of three counts of first degree murder. After the murders, but before sentencing, the legislature amended A.R.S. section 13-703.F to add multiple homicide convictions as an aggravating circumstance. We held that retroactively applying the new aggravating circumstance constituted a substantive change to capital murder and disadvantaged the defendant. *Id.* This change affected the substantive nature of the crime and sentencing by adding a new element that, if present, permitted the defendant to receive a more severe punishment than that available at the time of the crime.[5]

¶23 These cases clearly indicate not only that ex post facto principles generally do not bar applying procedural changes to criminal proceedings, but also that the general framework of a state's statutory capital sentencing scheme is procedural in nature. As *Collins* established, rights secured by the Sixth Amendment jury trial right, the

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[5] The Supreme Court's holding that aggravating factors serve as the functional equivalent of elements of the first degree murder offense makes this conclusion even more evident. *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443.

right at issue here, are inherently procedural. 497 U.S. at 51, 110 S. Ct. at 2724. Under the holding of *Dobbert*, Arizona's change in the statutory method for imposing capital punishment is clearly procedural: The new sentencing statutes alter the method used to determine whether the death penalty will be imposed but make no change to the punishment attached to first degree murder. The new sentencing statutes added no new element, or functional equivalent of an element, to first degree murder.[6] *Correll*, 148 Ariz. at 481-82, 715 P.2d at 734-35. Hence, the changes to the state's capital sentencing procedures do not resemble the type of after-the-fact legislative evil contemplated by contemporary understandings of the ex post facto doctrine.

¶24 Even a procedural change amounts to an ex post facto violation, however, when it affects "matters of substance, by depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime, or arbitrarily infringing upon substantial personal rights." *Collins*, 497 U.S. at 45, 110 S. Ct. at 2720 (quoting *Beazell*, 269 U.S. at 171, 46 S. Ct. at 69; *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S. Ct. 507, 508 (1915); and *Duncan v. Missouri*, 152 U.S. 377, 382-83, 14 S. Ct. 570, 572 (1894)) (internal quotation marks omitted). The change involved here does not affect the substantive matters of the defendants' prosecutions. *See id.* Under the new sentencing statutes, to obtain a death sentence, the state must prove the same aggravating circumstances required by the former statute and must prove them beyond a reasonable doubt. The only difference is that a jury, rather than a judge, decides whether the state has proved its case. The new sentencing statutes do not place the defendants in jeopardy of any greater punishment than that already imposed under the superseded statutes. Accordingly, applying the new sentencing statutes does not violate the federal or state Ex Post Facto Clause.

IV.

Does the Double Jeopardy Clause Prohibit Resentencing Under

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[6] S.B. 1001 made only technical and conforming changes to the aggravating circumstance list. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

¶25 The defendants argue that the double jeopardy provisions of the United States and Arizona Constitutions[7] preclude resentencing under the new sentencing statutes. We hold that they do not.

¶26 Double jeopardy prevents the government from prosecuting an individual more than once for the same offense. *Green v. United States*, 355 U.S. 184, 187, 78 S. Ct. 221, 223 (1957). According to the Supreme Court:

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88, 78 S. Ct. at 223; *see also Sattazahn v. Pennsylvania*, ___ U.S. ___, ___; 123 S. Ct. 732, 745-46 (2003) (reaffirming principle that the underlying purpose of the Double Jeopardy Clause is to prohibit repeated attempts by the state to convict, thereby exposing a defendant to embarrassment, expense, and the ordeal of another proceeding).

¶27 Double jeopardy principles generally do not apply to sentencing proceedings. *United States v. DiFrancesco*, 449 U.S. 117, 132, 101 S. Ct. 426, 435 (1980). Capital sentencing proceedings, however, provide an exception to the general rule. The penalty phase of a capital trial resembles an ordinary trial proceeding in which the sentencing authority chooses "between two alternatives together with standards to guide [its] decision, [and] the prosecution undert[akes] the burden of

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[7] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

"No person shall . . . be twice put in jeopardy for the same offense." Ariz. Const. art. II, § 10.

establishing facts beyond a reasonable doubt." *Monge v. California*, 524 U.S. 721, 730, 118 S. Ct. 2246, 2251 (1998) (discussing *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852 (1981)); *see Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 2310 (1984) (holding double jeopardy applies to the penalty phase of capital trial because the penalty phase "proceeding is like a trial"). Therefore, we must determine whether resentencing the defendants under Arizona's new sentencing statutes violates the prohibition against double jeopardy.

A.

Resentencing Does Not Increase Sentences.

¶28 The defendants argue that because Arizona's former law prescribing judge sentencing was unconstitutional, the most severe penalty they could have received for first degree murder at the original sentencing was life or natural life in prison. They assert that, under superseded section 13-703, a convicted murderer could not receive the death penalty because that punishment conceptually did not exist. Therefore, they argue, a resentencing proceeding under the new sentencing statutes would expose them to a more severe penalty than was originally available and thus constitutes double jeopardy. The defendants rely upon decisions from two state intermediate appellate courts, *California v. Harvey*, 142 Cal. Rptr. 887 (App. 1978), and *State v. Choate*, 151 Ariz. 57, 725 P.2d 764 (App. 1986).

¶29 In *Harvey*, a jury convicted Harvey of several counts, including first degree murder of a police officer. 142 Cal. Rptr. at 888. After Harvey's sentencing, the California Supreme Court declared the state's capital sentencing statute unconstitutional because it failed to bring mitigating evidence into the sentencing calculus. *Id.* at 890-91; *see Rockwell v. Superior Court*, 556 P.2d 1101, 1116 (Cal. 1976). While Harvey's appeal was pending, the California Legislature amended the state's capital sentencing scheme. *Harvey*, 142 Cal. Rptr. at 890-91. The state argued that Harvey should be resentenced under the new statute. *Id.* The appellate court disagreed, holding that resentencing would violate double jeopardy because, when the state supreme court

held the former capital sentencing scheme unconstitutional, "that declaration automatically reduced appellant's sentence to life imprisonment." *Id.* at 891.

¶30 Similarly, in *Choate*, the Arizona Court of Appeals held that double jeopardy prevented resentencing of a defendant on a dangerous-nature sentencing issue. 151 Ariz. at 58, 725 P.2d at 765. A jury convicted Choate of second degree murder and aggravated assault. *Id.* at 57, 725 P.2d at 764. The court of appeals vacated the dangerous-nature sentence for the second degree murder conviction because that issue was not determined by a jury. *Id.* On remand, the trial judge ordered a new jury to convene to determine whether Choate should receive the dangerous-nature sentence. *Id.* Choate appealed that order. The court of appeals concluded that, because the trial judge mistakenly dismissed the jury without submitting the dangerous nature charge in the first case, permitting a new jury to consider the enhancement allegation would constitute double jeopardy. *Id.* at 58, 725 P.2d at 765.

¶31 The Supreme Court addressed this very issue in *Dobbert*, however, and reached a different conclusion. Dobbert made the same argument that the defendants make here. The Florida Supreme Court declared the death penalty statute in effect at the time of his murders unconstitutional. Therefore, Dobbert argued, he could not receive a death sentence because "at the time he murdered his children there was no death penalty 'in effect' in Florida." 432 U.S. at 297, 97 S. Ct. at 2300. The Supreme Court rejected this argument, holding that double jeopardy did not attach because a statute, albeit unconstitutional, permitting capital punishment for first degree murder existed at the time of the crimes. *Id.* at 298, 97 S. Ct. at 2300. That statute placed the defendant on notice that he faced capital punishment if he were convicted. *Id.*

¶32 The *Harvey* court distinguished *Dobbert* by noting that Dobbert was ultimately sentenced under a constitutional statute, whereas Harvey was not. 142 Cal. Rptr. at 890. We do not find the distinction persuasive, however, because it does not affect the Supreme Court's *Dobbert* analysis. There the Court discounted the defendant's "sophistic

argument" because the more important consideration was that the state's first degree murder sentencing policy provided a death sentence even though the *procedures* for imposing that sentence later were found unconstitutional. *Dobbert*, 432 U.S. at 297-98, 97 S. Ct. at 2300 (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S. Ct. 317, 318 (1940)); *see also Knapp v. Cardwell*, 667 F.2d 1253, 1264 & n.9 (9th Cir. 1982) (rejecting argument that death sentence is automatically reduced "to life imprisonment immediately upon invalidation of the state's death penalty law"). In short, the Court rejected the defendants' argument in *Dobbert*.

¶33 The basic issue we must resolve is not whether a death sentence metaphysically existed when the defendants were sentenced, but rather whether any defendant was "acquitted" at his original trial of whatever findings were necessary to impose a death sentence. While a defendant can be resentenced following an appellate reversal of his or her original sentence, the Double Jeopardy Clause prohibits imposing any sentence of which the defendant was either actually or impliedly "acquitted" in the first instance. *Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310; *Bullington*, 451 U.S. at 437, 445, 101 S. Ct. at 1857, 1861; *Peak v. Acuna*, 203 Ariz. 83, ___ ¶ 8, 50 P.3d 833, 835 (2002) (stating implied acquittal exists where appellate court reverses conviction for insufficiency of evidence and double jeopardy precludes retrial). Thus, a defendant cannot be sentenced to death at a subsequent sentencing proceeding if "the sentencer or reviewing court has decided that the prosecution has not proved its case *that the death penalty is appropriate*." *Poland v. Arizona*, 476 U.S. 147, 155, 106 S. Ct. 1749, 1755 (1986) (internal quotation marks omitted).

¶34 The Supreme Court has thoroughly treated and established the legal principle that applies here. In *State v. Rumsey*, a jury convicted the defendant of first degree murder. 130 Ariz. 427, 636 P.2d 1209 (1981). During the sentencing phase of the trial, the judge, misinterpreting the pecuniary gain aggravating circumstance as applying only to a murder for hire, found no aggravating circumstances and sentenced the defendant to life in prison. *Id.* at 431-32, 636 P.2d at 1213-14. On appeal, we held that the pecuniary gain aggravating circumstance

included any murder committed for financial gain and remanded the matter for resentencing. *Id.* at 431, 636 P.2d at 1213. On remand, the judge determined that the pecuniary gain circumstance existed and sentenced the defendant to death. *State v. Rumsey*, 136 Ariz. 166, 168, 665 P.2d 48, 50 (1983). We reviewed the case on direct appeal and held that Rumsey's death sentence violated the Double Jeopardy Clause because the life sentence imposed at his first trial implicitly acquitted him of the death sentence, and that Rumsey was "entitled to finality" on that issue. *Id.* at 175, 665 P.2d at 57.

¶35 The Supreme Court granted *certiorari* and affirmed. It held that a capital defendant cannot receive the death penalty on resentencing if he originally had been sentenced to life in prison. *Rumsey*, 467 U.S. at 212, 104 S. Ct. at 2310. The Court explained that "an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.* at 211, 104 S. Ct. at 2310. Thus, the Supreme Court's *Rumsey* decision speaks to situations in which the defendant originally received a sentence *other than* death.

¶36 In a similar case in which the defendant originally received a capital sentence, however, the Supreme Court ruled differently. In *Poland v. Arizona*, the Court held that capital defendants sentenced to death at their original sentencing proceeding and whose sentences were vacated on appeal can be resentenced to death on remand. 476 U.S. at 151, 106 S. Ct. at 1753. Both of the Poland brothers received death sentences following their first degree murder convictions. *State v. Poland*, 132 Ariz. 269, 273, 645 P.2d 784, 788 (1982). During the sentencing phase, the judge failed to find the pecuniary gain aggravating circumstance because, like the trial judge in *Rumsey*, he misunderstood that circumstance as applying only to a murder for hire. *Id.* at 285-86, 645 P.2d at 800-01. The judge did, however, find the "especially heinous, cruel or depraved" statutory aggravating factor and sentenced the defendants to death. *Id.* at 285, 645 P.2d at 800. On appeal, this court held that the evidence adduced during the sentencing proceeding did not support a finding of a heinous, cruel or depraved murder. *Id.* at 285, 645 P.2d at 800. We also restated that a killing need not be a murder for hire to qualify for the pecuniary gain aggravator. *Id.*

at 286, 645 P.2d at 801. On remand, the judge again sentenced both Polands to death. *State v. Poland (Patrick)*, 144 Ariz. 388, 392, 698 P.2d 183, 187 (1985); *State v. Poland (Michael)*, 144 Ariz. 412, 414, 698 P.2d 207, 209 (1985). We again reviewed and affirmed the Polands' sentences on direct appeal and held that the evidence, although insufficient to support a finding of cruelty, did support a finding of pecuniary gain motive. *Poland (Patrick)*, 144 Ariz. at 407, 698 P.2d at 202; *Poland (Michael)*, 144 Ariz. at 416, 698 P.2d at 211.

¶37 On *certiorari*, the Supreme Court distinguished the Polands' case from *Rumsey*, and that distinction was critical. In *Poland*, both defendants *originally received* capital sentences. Unlike the judge in Rumsey's trial, no fact-finder had "acquitted" the Polands of capital murder by imposing a prison sentence at the first sentencing proceeding. *Poland*, 476 U.S. at 156-57, 106 S. Ct. at 1756. On resentencing, then, the defendants did not face sentencing on a charge of which they had been previously "acquitted" for double jeopardy purposes. *Id.* at 157, 106 S. Ct. at 1756. Therefore, jeopardy did not attach and double jeopardy did not bar the subsequent death sentences. *Id.*

¶38 Like the defendants in *Poland*, the defendants on direct appeal all received death sentences at their original trials. The fact-finder made those findings necessary to impose a death sentence. In no sense has a fact-finder concluded that the state failed to prove aggravating circumstances beyond a reasonable doubt. On remand, no defendant can receive a sentence greater than that which already has been imposed. Accordingly, we hold that jeopardy has not attached.

B.

Resentencing Does Not Supplement the Original Jury Verdict.

¶39 The defendants also argue that resentencing violates double jeopardy because further jury proceedings supplement the original jury verdict, thereby violating each defendant's constitutional "right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S.

684, 689, 69 S. Ct. 834, 837 (1949). Although completing a defendant's trial with the same judge or jurors is ideal, a defendant holds no absolute right to such an arrangement. In fact, in *Wade v. Hunter*, the Supreme Court affirmed a military conviction in which the charges were dropped from one court-martial proceeding and re-instituted in another to accommodate witnesses. *Id.* at 687-88, 69 S. Ct. at 836. According to the Supreme Court:

> The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.

Id. at 688-89, 69 S. Ct. at 837.

¶40 The ability to resentence a capital defendant by a different set of jurors is implicit in double jeopardy cases decided by the Supreme Court in a death penalty context. *See Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310; *Wade*, 336 U.S. at 688-89, 69 S. Ct. at 837.[8] A capital defendant whose original sentence is vacated on appeal can be resentenced to death so long as the defendant has not been "acquitted" of the death sentence. *E.g.*, *Sattazahn*, ___ U.S. at ___, 123 S. Ct. at 738; *Poland*, 476 U.S. at 151, 106 S. Ct. at 1753.

C.

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[8] For the most part, recalling the defendant's original guilt phase jury also presents logistical problems and is wholly impractical.

The Arizona Constitution.

¶41 We reach the same result under Article II, Section 10 of the Arizona Constitution. In *Pool v. Superior Court*, we interpreted the state Double Jeopardy Clause more broadly than its federal counterpart when prosecutorial misconduct causes a mistrial. 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984); *accord State v. Minnitt*, 203 Ariz. 431, ___ ¶ 29, 55 P.3d 774, 781 (2002). While we recognized the importance of consistency between federal and state constitutional law, we found it necessary to diverge from the double jeopardy standards established by the United States Supreme Court under the federal constitution. Our decision turned on the principle that the purpose of the Arizona Double Jeopardy Clause includes protecting citizens from facing multiple trials for the same offense because of prosecutorial bad faith:

> In our view, therefore, the resolution of the question of when jeopardy attaches should turn upon the concept of enforcing the constitutional guarantee against double jeopardy when the right to be free from multiple trials, which that clause was meant to guarantee, would be impaired by the prosecutor's intentional, improper conduct. We do not agree that standards cannot be formulated to accomplish the objectives of the clause in situations such as this.

Pool, 139 Ariz. at 108, 677 P.2d at 271 (citation omitted).

¶42 The defendants do not face further jeopardy because of prosecutorial misconduct. Moreover, we find no reason to extend the state Double Jeopardy Clause beyond its federal counterpart under these facts. Therefore, we conclude that applying the new sentencing statutes does not constitute a double jeopardy violation under the Arizona Constitution.

V.

Should Defendants Convicted of Murders Committed Before the Natural Life Sentence Became Available Have Their Sentences Reduced to Life if the Court Reduces Their Sentences?

¶43 In 1993, the Arizona Legislature amended A.R.S. section 13-703 to add a "natural life" sentencing option for defendants convicted of first degree murder. 1993 Ariz. Sess. Laws ch. 153, § 1. The parties stipulate, and we agree, that the sentence of life without the possibility of parole for twenty-five years, rather than natural life, must apply to those defendants sentenced under the pre-1993 statute. *See, e.g., State v. Barreras*, 181 Ariz. 516, 523-24 n.7, 892 P.2d 852, 859- 60 n.7 (1995) ("The amended statute [permitting natural life sentence] is inapplicable here, however, because this case arose before its effective date."). If subsequent proceedings result in life sentences, these defendants cannot receive a natural life sentence; only a sentence of life without the possibility of parole for twenty-five years can apply.

VI.

Should the Court Review Sixth Amendment *Ring II* Error as Structural Error or for Harmless Error?

¶44 The Supreme Court struck down Arizona's former capital sentencing statutes because they permitted a judge, rather than a jury, to find aggravating factors. *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. We conclude that Arizona's failure to submit this element of capital murder to the jury does not constitute structural error. Consequently, the Sixth Amendment does not require automatic reversal of a death sentence imposed under the former sentencing statutes. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833 (1999); *Arizona v. Fulminante*, 499 U.S. 279, 306-07, 111 S. Ct. 1246, 1263 (1991). Instead, we will review the defendants' capital sentences for harmless error.

¶45 Most errors that we consider on appeal, even those involving constitutional error, constitute trial errors, "which occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Fulminante*, 499 U.S. at 307-08, 111 S. Ct. at 1264.In cases involving trial error, we consider whether the error, so assessed, was harmless

beyond a reasonable doubt. If so, we uphold the verdict entered. In a limited number of cases, however, structural error occurs. In such instances, we automatically reverse the guilty verdict entered. Unlike trial errors, structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 3106 (1986)).

¶46 The Supreme Court has defined relatively few instances in which we should regard error as structural. Those instances involve errors such as a biased trial judge,[9] complete denial of criminal defense counsel,[10] denial of access to criminal defense counsel during an overnight trial recess,[11] denial of selfrepresentation in criminal cases,[12] defective reasonable doubt jury instructions,[13] exclusion of jurors of the defendant's race from grand jury selection,[14] excusing a juror because of his views on capital punishment,[15] and denial of a public criminal trial.[16] In all those instances, the error infected "the entire trial process" from beginning to end. *Neder,* 527 U.S. at 8, 119 S. Ct. at 1833 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 1717 (1993)).

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[9] *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

[10] *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963).

[11] *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330 (1976).

[12] *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944(1984).

[13] *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993).

[14] *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617 (1986).

[15] *Gray v. Mississippi*, 481 U.S. 648, 107 S. Ct. 2045 (1987).

[16] *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984).

¶47 The Court's *Ring II* decision turned upon the fact that aggravating circumstances serve as the functional equivalent of an element of the greater capital murder offense, rather than as a sentencing factor. *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. "Because Arizona's enumerated aggravating factors operate as the *functional equivalent of an element of a greater offense*," the Supreme Court held, "the Sixth Amendment requires that they be found by a jury." *Id.* (emphasis added) (citation and internal quotations omitted). The essential question, therefore, is whether we should characterize Arizona's failure to submit this element of the capital murder offense to the jury as structural or trial error.[17]

¶48 In a decision foreshadowing *Apprendi* and *Ring II*, the Supreme Court declined to find structural error when the trial judge failed to submit an element of the offense to the jury. In *Neder v. United States*, the Court held that the trial court's failure to instruct the jury on the materiality element of federal tax fraud should be reviewed as trial error. 527 U.S. at 19-20, 119 S. Ct. at 1839. The Court distinguished an error omitting an element of the offense in a jury instruction from structural error: "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9, 119 S. Ct. at 1833. Thus, the Court concluded, omitting an element of the offense from the jury instruction is not the sort of error that taints the trial process itself.

> Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed

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[17] At various times, the Court's opinion suggests that *Ring II* error should be considered under a harmless error analysis. First, the Court declined to review the case for harmless error, stating instead that state courts should be the first to do so. *Ring II*, 536 U.S. at ___ n.7, 122 S. Ct. at 2443 n.7. Second, when commenting upon the fate of death row inmates after the *Ring II* decision, Justice O'Connor stated that "prisoners will be unable to satisfy the standards of harmless error or plain error review." *Id.* at ___, 122 S. Ct. at 2449 (O'Connor, J., dissenting). Because the Court did not consider the issue of the appropriate standard of review, we do not regard these statements as conclusive.

> to consider all of the evidence and argument in respect to Neder's defense against the tax charges. Of course, the court erroneously failed to charge the jury on the element of materiality, but that error did not render Neder's trial "fundamentally unfair," as that term is used in our cases.

Id. at 9, 119 S. Ct. at 1834.[18]

¶49 In a similar decision that followed *Apprendi* and *Ring II,* the Court again applied the plain error test to a judge's consideration of a factor properly left to the jury. *United States v. Cotton*, 535 U.S. 625, ___, 122 S. Ct. 1781, 1785 (2002). Federal law makes available enhanced penalties for drug offenses if the government proves a statutory threshold drug quantity. *Id.* at ___, 122 S. Ct. at 1783. In *Cotton*, the government failed to allege in its superseding indictment the quantity of drugs involved in the offense, as required by the enhanced penalty. *Id.* Based on trial testimony, the district court found the petitioner "responsible for at least 500 grams of cocaine base," ten times the amount set by statute for an enhanced penalty, and imposed the enhanced sentence. *Id.* at ___, 122 S. Ct. at 1784. The Supreme Court concluded that the district court improperly usurped the quantity finding from the grand jury, but reviewed for plain error. *Id.* at ___, 122 S. Ct. at 1785-86. The Court held that the trial evidence was so "overwhelming" and "essentially uncontroverted" that "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at ___, 122 S. Ct. at 1786.

¶50 Although *Neder* and *Cotton* did not involve a capital sentence, their holdings that a failure to submit one element of an offense to a jury does not infect the trial process from beginning to end apply equally here. Under both Arizona's superseded and current capital sentencing schemes, a defendant's trial consists of two phases: a guilt phase and a penalty phase. In the guilt phase, the jury decides whether

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[18] *See also California v. Roy*, 519 U.S. 2, 5-6, 117 S. Ct. 337, 339 (1996) (holding trial judge's failure to instruct jury on an element of accomplice liability first degree murder was a trial error to which the harmless error test applied).

the defendant committed first degree or felony murder as defined by A.R.S. section 13-1105. If the jury finds the defendant guilty beyond a reasonable doubt, the trial continues to the penalty phase. Under the former system, the judge found, beyond a reasonable doubt, the ultimate element required to complete a capital murder offense: at least one aggravating circumstance not outweighed by one or more mitigating factors. A.R.S. § 13- 703.E. Defendants' trials thus took place before an impartial judge and jury, who used the correct standard of proof. Defendants received the assistance of counsel, who were available during all phases of their prosecution. Any error, then, affected the submission of one element rather than the entire trial and did not render the entire trial fundamentally unfair.[19] *See Neder*, 527

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[19] The dissent disagrees with this conclusion, arguing that the defendants experienced a "[c]omplete denial of [the right to] trial by jury at the sentencing phase . . . ." Dissent, ¶ 109. Notably, the dissent does not suggest that the defendants were denied a trial by jury, and it could not, for the error here resulted not from denying defendants a jury trial but from the failure to submit one element of the capital offense to the jury for decision. A capital trial comprises just one trial, divided into guilt and sentencing phases, and has always been understood as such, both by this court and by the U.S. Supreme Court. *See, e.g., Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S. Ct. 2630, 2634 (1994) (holding trier of fact must find one aggravating circumstance at either the guilt or penalty phase); *Payne v. Tennessee*, 501 U.S. 808, 817, 823, 825-26, 111 S. Ct. 2597, 2604, 2607-08 (1991) (repeated references to "guilt phase" and "penalty phase" of capital trial); *State v. Smith*, 203 Ariz. 75, *passim*, 50 P.3d 825, *passim* (2002) (referring to "sentencing phase" and "sentencing hearing"); *Ring I*, 200 Ariz. at 279 ¶ 42, 25 P.3d at 1151 (referring to a "separate evidentiary hearing"). The only courts of which we are aware that have considered the argument that a capital trial consists of two "trials" rather than two phases of one trial have rejected the dissent's approach. *Flamer v. Delaware*, 68 F.3d 736, 758-59 (3rd Cir. 1995) ("The guilt and penalty phases of a capital trial are parts of a single proceeding, and there is no constitutional requirement that they be treated as if they were two entirely separate trials."); *Holland v. Mississippi*, 705 So. 2d 307, 330 ¶ 61 (Miss. 1997) (sentencing phase of a capital trial not a separate trial, but that phase of the case that concerns sentencing).

Arizona statutes reflect the single capital trial approach accepted by our court and the Supreme Court. Arizona law refers to the sentencing proceeding as the capital trial's "penalty phase." *E.g.*, A.R.S. § 13-703.C. In addition, former and current capital sentencing statutes permit use at the sentencing phase of evidence adduced during the guilt phase of the trial. *Id.* §§ 13-703.C (2001), 13-703.D (Supp.

(continued...)

U.S. at 9, 119 S. Ct. at 1833.

¶51 We are not the first court to reach this conclusion. Courts implementing *Apprendi* and *Ring* have reached a consensus that structural error does not occur when a judge fails to submit to the jury an element of a crime, otherwise required to be found by a jury under the Sixth Amendment.[20] In *United States v. Matthews*, the court held "*Apprendi* error is susceptible to harmless error analysis." 312 F.3d 652, 665 (5th Cir. 2002). The Seventh Circuit Court of Appeals also found "that errors in both the indictment and the charge to the jury are subject to harmless-error analysis." *United States v. Dumes*, 313 F.3d 372, 385 (7th Cir. 2002); *accord United States v. Sanders*, 247 F.3d 139, 150 (4th Cir. 2001) (citing cases from the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits holding that harmless error applies in *Apprendi* cases); *Johnson v. Nevada*, P.3d 450, 459-60 (Nev. 2002).[21]

(...continued)
2002).

[20] The one case finding structural error is *Esparza v. Mitchell*, a case involving a challenge under the Eighth Amendment rather than the Sixth. In that case, two members of the panel held the harmless error test inapplicable in a capital case where, under Ohio law, aggravating factors were required to be charged in the indictment but were not. 310 F.3d 414, 421 (6th Cir. 2002). The dissenting judge, concluding that harmless error applied, outlined the seminal Supreme Court cases defining the harmless error doctrine and concluded that the error involved did not amount to deprivation of "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Id.* at 428 (Suhrheinrich, J., dissenting) (quoting *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833 (internal quotation marks omitted)).

[21] In addition to these decisions involving the Sixth Amendment, federal courts have held that Eighth Amendment violations occurring at the trial court level are subject to harmless error analysis. *See, e.g., Jones (Lewis) v. United States*, 527 U.S. 373, 402-05, 119 S. Ct. 2090, 2108-10 (1999); *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441 (1990). Most recently, the Ninth Circuit Court of Appeals held that a death sentence imposed when an unconstitutionally vague jury instruction was given could be reviewed for harmless error. *Valerio v. Crawford*, 306 F.3d 742, 756

(continued...)

¶52 Those holdings comport with prior Arizona law. In *State v. Styers*, we applied the fundamental error test to the trial judge's failure to define the "without legal authority" element of the kidnapping offense in instructions to the jury. 177 Ariz. 104, 111-12, 865 P.2d 765, 772-73 (1993).

¶53 Accordingly, we hold that Arizona's failure to require a trial judge to submit the aggravating circumstance element of capital murder to a jury does not constitute structural error. We will review the sentences of these defendants for harmless error.

VII.

A.

Does *Ring II* Apply to Aggravating Circumstances Involving Prior Convictions?

¶54 Arizona law establishes two aggravating circumstances for prior criminal convictions.[22] A.R.S. § 13-703.F.1-.2. The first of Arizona's prior conviction factors, A.R.S. section 13- 703.F.1, applies when "[t]he defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." The second, A.R.S. section 13-703.F.2, is implicated when "[t]he defendant was previously convicted of a serious

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(...continued)
(9th Cir. 2002) ("When a state trial court sentences a defendant to death based in part on an unconstitutionally vague aggravating circumstance, the state appellate court . . . can find the error harmless under *Chapman v. California*." (Citation omitted.)).

[22] The 2002 amendment did not change the F.1 and F.2 aggravating factors. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

offense, whether preparatory or completed."[23] In *Almendarez-Torres v. United States*, the Supreme Court held that a judge could consider prior convictions to enhance a penalty beyond that authorized by the facts established by the jury's verdict. 523 U.S. 224, 226-27, 118 S. Ct. 1219, 1222 (1998).

¶55 The State argues that *Almendarez-Torres* establishes an exception to *Apprendi/Ring* for the two prior conviction aggravating circumstances. According to the State, a judge may constitutionally determine the existence of any prior conviction. The defendants argue

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[23] Section 13-703.H defines "serious offense" as:

1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.
5. Sexual assault.
6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.

A.R.S. § 13-703.H (Supp. 2002).

Before 1993, this aggravating circumstance occurred if "[t]he defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." A.R.S. § 13-703.F.2 (1989), *amended by* 1993 Ariz. Sess. Laws ch. 153, § 1.

that *Almendarez-Torres* is no longer good law.[24] They also argue that the F.1 and F.2 aggravating circumstances do not fit within the prior conviction exception. Alternatively, they argue that the Arizona Constitution's jury trial guarantee should supplant *Almendarez- Torres* and require a jury determination of prior convictions. For the following reasons, we hold that *Almendarez-Torres* remains effective and that the Sixth Amendment does not require a jury to determine prior convictions under sections 13-703.F.1 and F.2.

1. Prior Conviction Aggravating Circumstance.

¶56 First we consider whether Arizona's statutory aggravating circumstance for prior convictions falls within the *Almendarez-Torres* exception. In cases handed down within the past five years, the Supreme Court consistently has stated that a statutory provision permitting increased penalties when a defendant has a prior conviction operates as a sentencing enhancement and not as an element of a criminal offense.[25]

¶57 In two Supreme Court cases, defendants challenged sentencing enhancements when the government failed to allege the factor

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[24] The defendants argue that we should ignore *Almendarez- Torres* because Justice Thomas allegedly has repudiated his position in that case, thereby "expressly" invalidating the decision. In *Apprendi v. New Jersey*, Justice Thomas did express regret for voting with the five member *Almendarez-Torres* majority. 530 U.S. 466, 518-21, 120 S. Ct. 2348, 2378-79 (2000).

The defendants' supposition as to Justice Thomas's view, however, does not comport with the Supreme Court's recent decision in *Sattazahn v. Pennsylvania*, U.S. ___, 123 S. Ct. 732 (2003). In that case, Justice Thomas joined Justice Scalia's separate opinion which stated, in *dicta*, that "the existence of any fact *(other than a prior conviction)* increas[ing] the maximum punishment that may be imposed . . . constitutes an element [of the offense]." *Id.* at ___, 123 S. Ct. at 739 (emphasis added). This language demonstrates the dangers of vote-counting before the Court announces its decision on a particular issue.

[25] The Court continuously refers to the prior conviction enhancement as an exception to *Apprendi*. *E.g.*, *Sattazahn*, ___U.S. at ___, 123 S. Ct. at 739; *United States v. Cotton*, 535 U.S. 625, ___, 122 S. Ct. 1781, 1783 (2002).

increasing their penalty in the indictment. In *Almendarez-Torres*, the Court held that a prior conviction need not be alleged in a criminal indictment. 523 U.S. at 226-27, 118 S. Ct. at 1222. The Court first concluded that Congress intended to use recidivism as a sentencing factor and not as a substantive element. *Id.* at 230-31, 118 S. Ct. at 1226. It then noted that recidivist provisions traditionally are used exclusively as sentencing factors, pointing out that no federal criminal statute contains recidivism as a statutory element. *Id.* at 244, 118 S. Ct. at 1231. Enhanced penalties for repeat offenders do "not relate to the commission of the offense, *but go[] to the punishment only*, and therefore . . . may be subsequently decided [by a judge]." *Id.* at 244, 118 S. Ct. at 1231 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629, 32 S. Ct. 583, 588 (1912)).

¶58 In its next term, the Court decided a similar case and reached a revised, but consistent, conclusion. In *Jones v. United States*, the Court held that federal prosecutors must allege in the indictment and prove, beyond a reasonable doubt, an element of the federal car jacking statute the lower courts previously had regarded as a sentencing factor. 526 U.S. 227, 229, 119 S. Ct. 1215, 1217 (1999). In Jones's case, serious bodily injury provided the additional element. *Id.* at 231, 119 S. Ct. at 1218. Notwithstanding its decision, the Court reaffirmed that "not every fact expanding a penalty range must be stated in a felony indictment" and expressly distinguished sentence enhancements for prior criminal convictions from other statutory elements because the law traditionally regards "recidivism as a sentencing factor, not as an element to be set out in the indictment." *Id.* at 248-49, 119 S. Ct. at 1226-27. The Court appeared less concerned with the fact that *Jones* involved a Sixth Amendment challenge, while *Almendarez-Torres* did not, than with the fact that sentencing enhancements for prior convictions serve a traditional penological purpose. *Id.*

¶59 The Court revisited the prior conviction sentence enhancement issue in *Apprendi,* decided one year after *Jones*. In *Apprendi*, the Court held that a statutory provision providing an increased penalty when a crime was motivated by "hate" involved not a sentencing enhancer, but an element of the offense. 530 U.S. at 491-92, 120 S. Ct. at 2363.

Consequently, the Sixth Amendment jury trial right required that the jury determine the element's existence before the enhanced penalty could be imposed. *Id.* at 490, 120 S. Ct. at 2362-63 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). The Court carefully distinguished its view that prior convictions are not elements of an offense and structured its holding to exclude prior convictions from its reach. *Id.* at 487-90, 120 S. Ct. at 2361-63.

¶60 The *Apprendi* Court found no need to submit the question of prior convictions to the jury because, unlike other factors, prior convictions already had been established through proceedings incorporating procedural safeguards:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum statutory range.

530 U.S. at 488, 120 S. Ct. at 2362. Thus, permitting a judge to decide the "fact" of a prior conviction does not raise Sixth Amendment concerns; those convictions are themselves products of Sixth Amendment-compliant proceedings.

¶61 We cannot ignore a Supreme Court decision interpreting federal law unless the Court expressly overrules or casts cognizable doubt on that decision. In *Agostini v. Felton*, the Court stated:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989)); *accord United States v. Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) ("If the views of the Supreme Court's individual justices and the composition of the Court remain the same, *Almendarez-Torres* may eventually be overruled.") (citing *Apprendi*, 120 S. Ct. at 2362 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.")); *State v. Harrod*, 200 Ariz. 309, 318 ¶ 44, 26 P.3d 492, 501 (2001) (rejecting defendant's argument that *Apprendi* implicitly overruled *Walton*), *vacated on other grounds by Harrod v. Arizona*, ___ U.S. ___, 122 S. Ct. 2653 (2002) (mem.). Our constitutional system requires adherence to the rule of law established in *Almendarez-Torres* unless and until the Court unequivocally disapproves its holding. *Ring I*, 200 Ariz. at 279-80 ¶ 44, 25 P.3d at 1151-52.

2. Lower Federal and State Appellate Courts.

¶62 Courts consistently have implemented both *Apprendi* and *Almendarez-Torres*. In cases decided after *Apprendi*, many defendants facing prior conviction sentence enhancements argued that *Apprendi* had either overruled or cast doubt upon *Almendarez-Torres*. Courts universally reject this argument and recognize that the two cases can be harmonized by construing *Almendarez-Torres* as the exception to *Apprendi*'s general rule. *E.g.*, *United States v. Martino*, 294 F.3d 346, 349 (2d Cir. 2002); *United States v. Stone*, 306 F.3d 241, 243 (5th Cir. 2002); *Cherry v. Araneta*, 203 Ariz. 532, ___ ¶ 5, 57 P.3d 391, 392-93 (App. 2002); *State v. Kendall*, 58 P.3d 660, 667-68 (Kan. 2002). In explaining its decision, the Ninth Circuit Court of Appeals stated:

> It is true that in *Apprendi,* the Court expressed reservations about *Almendarez-Torres.* However, the Court reasoned that any due process or Sixth Amendment concerns—arising out of the judicial determination of a "fact" that increased punishment beyond the statutory maximum—were mitigated in

> *Almendarez-Torres* by "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that [the defendant] did not challenge the accuracy of that 'fact' in his case." Thus, the Court in *Apprendi* chose not to overrule *Almendarez-Torres*, and unmistakably carved out an exception for "prior convictions" that specifically preserved the holding of *Almendarez-Torres*.

Pacheco-Zepeda, 234 F.3d at 414 (citations omitted).

¶63 The Supreme Court consistently has held that legislatures may permit a judge to impose an increased penalty based upon a defendant's recidivism. We therefore conclude that the Sixth Amendment does not require a jury to find prior convictions beyond a reasonable doubt.

3. F.1 and F.2 Prior Conviction Aggravating Factors.

¶64 Several defendants whose cases are consolidated in this appeal received death sentences based, at least in part, upon prior conviction findings made by a sentencing judge. Following the teachings of *Almendarez-Torres*, *Jones* and *Apprendi*, we hold that the Sixth Amendment does not require remanding these cases for resentencing on the F.1 and F.2 circumstances.

¶65 The characteristic of a prior conviction aggravating circumstance that sets it apart from other circumstances is that the original criminal proceeding, through either a guilty plea or a verdict of guilt, established the circumstance. No additional benefit derives from having a jury re-find an aggravating circumstance already established through a guilty plea or a jury verdict. At each proceeding giving rise to the prior criminal conviction, defendants either waived their right to a jury trial or received a jury determination of guilt, and procedural safeguards protected the defendant against constitutional violations. Moreover, each defendant had an opportunity to appeal his conviction.

¶66 The F.1 and F.2 aggravating circumstances contemplate a more severe punishment for persons who continue to commit crimes. Our

jurisprudence traditionally has viewed recidivism as a sentencing factor to be determined by a judge. *Almendarez-Torres*, 523 U.S. at 243, 118 S. Ct. at 1230. Moreover, under the pre-*Ring II* capital sentencing scheme, the legislature clearly intended prior convictions to be sentencing factors and not substantive elements of capital murder. *See, e.g.*, A.R.S. § 13-703.F–.G (Supp. 2001) (instructing the court to consider aggravating circumstances when deciding which sentence to impose).

¶67 We reach a different conclusion for those defendants for whom the trial judge found an F.2 aggravating circumstance prior to 1993. As to those defendants, determining the presence of the F.2 factor required additional fact finding; the judge needed to go beyond the mere fact that the prior conviction existed.

¶68 Arizona amended the requirements for finding an F.2 factor in 1993.[26] Prior to the 1993 amendment, section 13- 703.F.2 permitted finding this aggravating circumstance when "[t]he defendant was previously convicted of a felony in the United States *involving the use or threat of violence on another person*." A.R.S. § 13-703.F.2 (1989) (emphasis added). State law did not define "violence" in this context. In *United States v. Breitweiser*, the court pointed out:

> If a recidivist statute permitted enhancement based on proof of underlying conduct, however, factual questions could arise as to exactly what conduct the defendant engaged in. Typically, such factual questions are within the province of a jury and this Court doubts that the Supreme Court would construe *Almendarez-Torres* as applying to such situations.

220 F. Supp. 2d 1374, 1379 (N.D. Ga. 2002). We agree that when an additional finding must be made beyond the bare fact that a prior conviction exists, the Sixth Amendment demands that a jury perform this task. That situation can arise for defendants whose F.2 factor depended upon a finding that a prior conviction reflected a crime

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[26] 1993 Ariz. Sess. Laws ch. 153, § 1.

involving the use or threat of violence. None of the consolidated defendants were sentenced under such a circumstance. Therefore, none of these cases involve a Sixth Amendment violation based on a judge's finding of one or more F.2 aggravating circumstances.

4. The Arizona Constitution.

¶69 This court has held that the Arizona Constitution's Sixth Amendment analog, Article II, Section 23,[27] provides substantially the same right to a jury trial as does the Sixth Amendment. *State v. Carlson*, 202 Ariz. 570, 577 ¶ 18, 48 P.3d 1180, 1187 (2002). Nevertheless, the defendants urge us to look to the Arizona Constitution to find a requirement that prior conviction aggravating circumstances must be found by a jury.

¶70 They point to two decisions. The first, *State v. Carlson*, rejected an argument that the Arizona constitutional right to an impartial jury provides greater protection than does the federal constitution against pretrial publicity affecting the jury pool. *Id.* at 576-77 ¶¶ 17-18, 48 P.3d at 1186-87. We stated that our constitution does not afford any greater protection to defendants against pretrial media coverage than does the federal constitution. *Id.* at 577 ¶ 18, 48 P.3d at 1187. The second case, *State ex rel. McDougall v. Strohson*, held that Arizona's Constitution traditionally provides greater access to jury trials than that required by the federal constitution. 190 Ariz. 120, 121-22, 945 P.2d 1251, 1252-53 (1997). Under the federal constitution, only crimes punishable by more than six months in jail must be tried by a jury. *Id.* at 122, 945 P.2d at

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[27] That provision states:

> The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Ariz. Const. art. II, § 23.

1253. In instances in which a defendant can be sentenced to less than six months in jail, in contrast, our constitution demands a jury trial if "the moral quality of the act charged, and its relationship to common law crimes" requires that a jury determine guilt.[28] *Id.*

¶71 In relying on these decisions, the defendants overlook the distinction between jury impartiality or jury access issues and the *Apprendi/Ring* issue. The *Carlson* case rejected an expansive interpretation of the Arizona Constitution because we were unwilling to move beyond federal precedent in this area. Our holding in *Strohson* means only that a defendant is entitled to a jury trial for certain minor crimes for which the federal constitution does not require a jury trial.

¶72 Under these facts, then, we hold that Article II, Section 23 provides substantially the same jury trial right as does the Sixth Amendment.

B.

Can the Finding of an Aggravating Circumstance Be Implicit in the Jury's Verdict of Conviction?

¶73 We asked the parties to discuss whether any aggravating circumstance could necessarily derive from a jury's verdict of conviction for first degree murder, either standing alone or when considered in conjunction with other contemporaneous convictions. The State argues that pecuniary gain, A.R.S. section 13-703.F.5, other homicides committed during the commission of the offense, A.R.S. section 13-703.F.8, and age of victim less than fifteen years or seventy years or older, A.R.S. section 13-703.F.9, can logically inhere in a verdict. The defendants argue that an aggravating circumstance can never be implicit.

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[28] For instance, we have held that the crimes of driving under the influence, *Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966), and possession of marijuana, *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989), require a jury trial even though they are punishable by less than six months in jail.

¶74 We hold that the pecuniary gain and multiple homicide aggravators usually are not implicit in a jury's verdict. However, the age of the victim can be implicit in the verdict, if the jury simultaneously convicts the defendant of an offense that includes the age of the murdered victim as an element of the crime.[29]

1. Pecuniary Gain.

¶75 Under A.R.S. section 13-703.F.5, an aggravating circumstance exists when a murder is committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703.F.5. To establish the pecuniary gain aggravating circumstance, the state must prove that the murder would not have occurred but for the defendant's pecuniary motive. *State v. Harding*, 137 Ariz. 278, 296-97, 670 P.2d 283, 394-95 (1983).

¶76 Determining whether a defendant murdered his victim for pecuniary gain requires a highly fact-intensive inquiry. The state must establish the connection between the murder and motive through direct or strong circumstantial evidence. *State v. Cañez*, 202 Ariz. 133, 159 ¶ 94, 42 P.3d 564, 590 (2002) (holding murder of victim and only witness to robbery "is powerful circumstantial evidence of an intent to facilitate escape" and supports finding pecuniary motive); *State v. Gillies*, 135 Ariz. 500, 512, 662 P.2d 1007, 1019 (1983) ("Without some tangible evidence, or strong circumstantial inference, it is not for the sentencing court to conclude that because money and items were taken, the purpose of the murder was pecuniary gain.").

¶77 Complex fact situations require careful attention and analysis before a fact-finder confidently can conclude that pecuniary ends motivated the killing. When the state concurrently prosecutes a capital defendant for first degree murder and, for instance, robbery, both crimes resulting from the same occurrence, the state does not establish

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[29] The 2002 amendment did not change the F.5 and F.8 aggravating circumstances. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1. It did, however, make a technical change to the F.9 factor. *Id.*

the pecuniary gain factor simply by showing that the robbery occurred. Rather, the state assumes the additional burden of showing that pecuniary gain was "a motive, cause, or impetus for the murder and not merely the result of the murder." *State v. Kayer*, 194 Ariz. 423, 433 ¶ 32, 984 P.2d 31, 41 (1999); *see, e.g., State v. Lee*, 185 Ariz. 549, 558, 917 P.2d 692, 701 (1996) (affirming pecuniary gain aggravating circumstance where defendant killed to facilitate escape after robbery).

¶78 The pecuniary gain factor thus requires more than the jury's conviction of a defendant for first degree murder and robbery or burglary. The fact-finder must draw the separate conclusion that the defendant killed, at least in part, for pecuniary motive. For that reason, we cannot conclude that a jury finding of pecuniary gain inheres in its robbery or burglary verdict.

¶79 Therefore, we will apply a harmless error analysis to the pecuniary gain factor. In those instances in which no reasonable jury could find that the state failed to prove a pecuniary gain motive beyond a reasonable doubt, we will find harmless error affecting that factor. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

2. Multiple Homicides.

¶80 A.R.S. section 13-703.F.8 permits a judge to find an aggravating circumstance if "[t]he defendant has been convicted of one or more other homicides, as defined in § 13-1101, that were committed during the commission of the offense." A.R.S. § 13-703.F.8. As with the pecuniary gain factor, this factor requires the state to establish more than that the jury convicted the defendant of first degree murder and one or more other homicides occurring around the same time. Instead, all homicides must take place during "one continuous course of criminal conduct." *State v. Rogovich*, 188 Ariz. 38, 45, 932 P.2d 794, 801 (1997) (quoting *State v. Ramirez*, 178 Ariz. 116, 130, 871 P.2d 237, 251 (1994)). This conclusion can be drawn only after the fact-finder analyzes "the temporal, spatial, and motivational relationships between the capital homicide and the collateral [homicide], as well as

. . . the nature of that [homicide] and the identity of its victim." *Id.* (quoting *State v. Lavers*, 168 Ariz. 376, 393, 814 P.2d 333, 350 (1991)).

¶81 A jury verdict convicting a defendant of two or more homicides does not in itself establish the multiple homicide aggravating circumstance. Without a finding that the murders are temporally, spatially and motivationally related, the bare jury verdict does not implicitly support the F.8 aggravator. *Id.*

¶82 e will find harmless error affecting this factor in hose cases in which no reasonable jury could find that the state failed to prove the F.8 factor beyond a reasonable doubt. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

3. Age of Victim.

¶83 Under A.R.S. section 13-703.F.9, an aggravating circumstance exists when, at the time the murder was committed, "[t]he defendant was an adult . . . or tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older." A.R.S. § 13-703.F.9. The statute is straightforward; the ages of the offender and victim invoke the aggravator. *Medina*, 193 Ariz. at 511 ¶ 23, 975 P.2d at 101 (holding this aggravating circumstance does not require further finding that the defendant was aware of the victim's age). The F.9 finding is implicit in the jury's verdict if the jury convicts the defendant of first degree murder and another crime committed against the murder victim in which the age of the victim constitutes a substantive element of the crime.

¶84 In some instances, Arizona's criminal code defines crimes based on the young age of the victim. For example, a person commits child molestation "by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age." A.R.S. § 13-1410.A (2001).

¶85 Because the victim's age constitutes a substantive element of certain criminal offenses, a conviction necessarily reflects a jury determination that the victim was less than fifteen years old. The jury will have already found the necessary fact, age of the victim, through criminal proceedings compliant with Sixth Amendment safeguards. *Apprendi*, 530 U.S. at 488, 120 S. Ct. at 2362. Under these circumstances, the jury's implicit finding of the victim's age satisfies the F.9 aggravating circumstance.

¶86 If the trial judge found the F.9 factor and the jury also convicted the defendant of an age-dependent crime committed against the murder victim, we will find any *Ring II* error harmless. Other circumstances that may involve harmless error include, for example, those instances in which the defendant stipulated to the age of the victim or in which overwhelming evidence establishes the victim's age. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

C.
If One Aggravating Factor Was Not Subject to *Ring II*, Was Implicitly Found by the Jury or it Was Otherwise Obvious that One Aggravator Has Been Established Beyond a Reasonable Doubt,Is There Need for Resentencing?

¶87 The State asserts that if the jury implicitly found one aggravating factor or the trial judge found one factor not subject to the *Ring II* analysis, we can uphold the capital sentence imposed by the trial judge as harmless error. The argument relies upon the fact that Arizona's superseded sentencing scheme rendered a defendant "death eligible" if one aggravating factor existed. *Ring I*, 200 Ariz. at 279 ¶ 42, 25 P.3d at 1151. Nothing in *Ring II*, the State argues, prevents a trial judge from finding the second and succeeding aggravating factors, as well as finding mitigating factors and balancing them against the aggravator.

¶88 A narrow reading of *Ring II* may permit a judge to decide the existence of additional aggravating factors in the circumstances described by the State. As the State contends, once the government

establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view, however, *Ring II* should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single aggravating factor, we conclude that *Ring II* requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring II*, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

¶89 Another factor leads us to conclude that we should not adopt the State's argument. As is evident, the procedures urged by the State do not reflect any sentencing procedure ever adopted by our legislature. In both the superseded and current capital sentencing schemes, the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. §§ 13- 703.E (Supp. 2002) and 13-703.F (Supp. 2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. We will not speculate about how the State's proposal would impact this essential process. *Clemons v. Mississippi*, 494 U.S. 738, 754, 110 S. Ct. 1441, 1451 (1990) ("In some situations, a state appellate court may conclude that peculiarities in a case make appellate . . . harmless error analysis extremely speculative or impossible."); *see also Johnson v. Nevada*, 59 P.3d 450 (Nev. 2002)(as applied to Nevada law, *Ring II* requires jury to weigh mitigating and aggravating factors under Nevada's statute requiring the fact-finder to further find whether mitigating circumstances are sufficient to outweigh the aggravating circumstances).

¶90 We therefore hold that the presence of one or more aggravating factors either exempt from *Ring II*, inherent in the jury's guilty verdict,

or otherwise established beyond a reasonable doubt does not, in itself, establish that a defendant's capital sentence resulted from harmless error.

D.

Does *Ring II* Require Resentencing if a Defendant Conceded or Did Not Challenge the Aggravating Factors Found by the Trial Court?

¶91 The State contends that if a defendant stipulates to facts sufficient to establish an aggravating factor or fails to challenge one or more aggravating circumstances, that factor stands. The failure renders error harmless and essentially establishes overwhelming, undisputed proof of that factor's existence. The defendants argue that neither concession nor failure to contest waives a defendant's right to a jury trial on aggravating factors. Substantial differences exist between a defendant's decision to concede an aggravating circumstance and a defendant's decision not to contest an aggravating circumstance, and we distinguish between those situations.

¶92 In *United States v. Cotton*, the Supreme Court reviewed a case in which the defendant did not contest an element responsible for his sentence enhancement. 535 U.S. 625, 122 S. Ct. 1781 (2002). The issue was whether *Apprendi* required vacating an enhanced sentence under a federal narcotics criminal statute when the government failed to include in the indictment the amount of cocaine, a fact essential to justifying the enhanced sentence. *Id.* at ___, ___ n.3, 122 S. Ct. at 1783, 1786 n.3. After examining for plain error, the Court found no reversible error under *Apprendi* because the government presented overwhelming and essentially uncontroverted evidence of the amount of cocaine base at trial. *Id.* at ___ & n.3, 122 S. Ct. at 1786 & n.3; *see also United States v. Smith*, 282 F.3d 758, 771-72 (9th Cir. 2002) (holding *Apprendi* error harmless where defendant failed to contradict evidence establishing drug quantity or object to jury instruction stating threshold drug quantity need not be found); *Robinson v. United States*, 129 F. Supp. 2d 627, 632 (S.D.N.Y. 2001) (holding failure to submit drug

quantity issue to jury did not prejudice defendant when he did not challenge the amount).

¶93 In cases in which a defendant stipulates, confesses or admits to facts sufficient to establish an aggravating circumstance, we will regard that factor as established. Our harmless error inquiry then focuses on whether no reasonable jury could find that the mitigation evidence adduced during the penalty phase is "sufficiently substantial to call for leniency." A.R.S. §13-703.E. Unless we conclude beyond a reasonable doubt that a jury would impose a death sentence, we must remand the case for resentencing. *See Id.* § 13-703.E; *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 1838 (1999); *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). See *infra*, Section VIII.

¶94 When a defendant simply fails to challenge an aggravating circumstance at the penalty phase, the state retains the burden of proving the aggravator's existence beyond a reasonable doubt. *See State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997). Our inquiry then becomes whether the state has met its burden. If reasonable doubt exists as to this factor, then we must consider remanding for resentencing.

E.

Can the State Raise Harmless Error if It Did Not Make That Argument Below?

¶95 The defendants argue that the State waived its harmless error argument by failing to raise it prior to this stage of litigation. We disagree. Until the Supreme Court overruled *Walton v. Arizona*, the State had no reason to argue that failure to obtain jury findings as to aggravating factors constituted error at all. *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2, 113 S. Ct. 838, 842 n.2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed."). Only after the Court defined constitutional error in Arizona's sentencing procedure did the question whether such error was harmless arise. We will not penalize the State for failing to

anticipate the Court's holding in *Ring II*.

¶96 Moreover, the Arizona Constitution imposes an independent obligation on the state judiciary not to reverse a case "for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." Ariz. Const. art. VI, § 27 (2001); *accord* A.R.S. § 13-3987 (2001). If error is harmless, in these or other cases, substantial justice has been done.

F.

Does the Sixth Amendment Require the Jury to Make *Enmund-Tison* Findings in Capital Felony Murder Cases?

¶97 In cases of first degree felony murder convictions, an *Enmund-Tison* finding must be made to satisfy the Eighth Amendment's proportionality standard. *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368 (1982). In Arizona, the trial judge makes this finding. *See State v. Greenway*, 170 Ariz. 155, 171, 823 P.2d 22, 38 (1991). The defendants argue that *Ring II* requires that *Enmund-Tison* findings be made by a jury. We hold that the Sixth Amendment principles of *Apprendi/Ring* do not require a jury to make *Enmund-Tison* findings.

¶98 The Eighth Amendment's Cruel and Unusual Punishment Clause prohibits "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."[30] *Weems v. United States*, 217 U.S. 349, 371, 30 S. Ct. 544, 551 (1910) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40, 12 S. Ct. 693, 699-700 (1892) (Field, J., dissenting)). In capital punishment terms, the Eighth Amendment requires courts to consider carefully death sentences imposed on defendants convicted of felony murder. In *Enmund v. Florida* and *Tison*

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[30] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666, 82 S. Ct. 1417, 1420 (1962).

v. Arizona, the Supreme Court imposed Eighth Amendment cruel and unusual punishment restraints in capital felony murder cases. The Court held that Eighth Amendment principles forbid a state from sentencing to death a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund*, 458 U.S. at 797, 102 S. Ct. at 3376. Five years later, in *Tison*, the Court refined its prior decision by holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158, 107 S. Ct. at 1688.

¶99 The Supreme Court already has addressed the question whether a jury must make *Enmund-Tison* findings. In *Cabana v. Bullock*, the Court held that the federal constitution does not require a jury to determine a defendant's level of culpability in capital felony murder cases. 474 U.S. 376, 385, 106 S. Ct. 689, 696 (1986). Foreshadowing its recent Sixth Amendment decisions, the Court distinguished *Enmund* from the statutorily defined elements of a substantive offense at issue in *Apprendi*:

> [O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant—it *establishes no new elements of the crime of murder that must be found by the jury.* Rather, as the Fifth Circuit itself has recognized, *Enmund* "does not affect the state's definition of any substantive offense, even a capital offense." *Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill.

Id. (citation and footnote omitted)(emphasis added).

¶100 We conclude that this distinction withstands *Apprendi* and *Ring II*. *Enmund-Tison* findings affect sentencing very differently than do

findings of aggravating circumstances. Even if a jury is satisfied that the state has established all statutory elements for capital felony murder, including aggravating circumstances, the judge must remove the defendant from the class of defendants otherwise death-eligible if she cannot make *Enmund-Tison* findings. The question is not whether the state has met its burden but whether, given a defendant's culpable mental state, the government can impose capital punishment consistent with the Eighth Amendment's proportionality threshold. That determination involves not a Sixth Amendment jury trial right but rather an Eighth Amendment proportionality analysis, traditionally the prerogative of the judge. As the *Cabana* Court stated:

> [T]he decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make.

Id. at 386, 106 S. Ct. at 697.

¶101 The difference between aggravating circumstances as substantive elements of a greater offense and the *Enmund-Tison* findings as a restraint on capital sentencing dictates our decision that *Apprendi/Ring* does not require these findings to be made by the jury. *Id.* The Sixth Amendment assigns to the jury responsibility for determining whether all statutory criminal elements exist. Therefore, a defendant cannot receive a particular sentence unless a jury finds all the elements of the offense charged. *Id.* at 384, 106 S. Ct. at 696 (citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968)). The *Enmund-Tison* findings, on the other hand, operate as a judicially crafted instrument used to measure proportionality between a defendant's criminal culpability and the sentence imposed. These two rules of law are conceptually and constitutionally distinct. We hold that the Sixth Amendment does not require that a jury, rather than a judge, make *Enmund- Tison* findings.

VIII.

Conclusion.

¶102 Our review of aggravating circumstances will produce one of several results. In some of these consolidated cases, our review will not allow the conclusion, beyond a reasonable doubt, that the error did not contribute to or affect the capital sentence. In those cases, we must remand for resentencing.

¶103 Other cases will involve aggravators that we will regard as established. In some of those cases, the aggravating factors fall outside the *Ring II* analysis. Others will involve aggravating factors that inhere in the jury's verdict or to which a defendant stipulated. In yet other instances, the evidence presented at trial and the sentencing hearing may be sufficiently overwhelming that we will conclude no reasonable jury would have failed to find the factor established beyond a reasonable doubt. Even in these instances, however, one further determination can affect our harmless error analysis.

¶104 Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section *and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency*.

A.R.S. § 13-703.E (emphasis added);[31] *see also Id.* § 13-703.01.H. Because a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact

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[31] The legislature's post-*Ring II* amendments to section 13-703 replaced "court" with "trier of fact," referring to the jury or, in cases of a waiver of trial by jury, the court. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

would determine that the mitigating circumstances were sufficiently substantial to call for leniency. If we cannot reach that conclusion, we must find reversible error and remand the case for resentencing. In separate opinions, we will consider individually the sentences of these defendants, applying the standards set forth in this opinion.

Ruth V. McGregor, Vice Chief Justice

CONCURRING:

Rebecca White Berch, Justice
Michael D. Ryan, Justice

F E L D M A N, Justice (Retired), concurring in part and dissenting in part:

¶105 I dissent from Part VI of the majority opinion because I cannot agree that the complete absence of the jury in the separate capital sentencing proceeding that determines a defendant's eligibility for the death penalty is reviewable for harmless error. In my view, the denial of a jury in the sentencing phase is a defect in the fundamental mechanism of the trial and is therefore structural error; thus the death sentence should be vacated. This is not only required by logic but is the teaching of a long line of our cases.

¶106 We have just recently held, for instance, that the erroneous exclusion for cause of prospective jurors was structural error that required reversal. *State v. Anderson*, 197 Ariz. 314, 324, ¶ 23, 4 P.3d 369, 379, ¶ 23 (2000). To hold otherwise and review for harmless error would lead us "down a slippery slope that could be used to justify overlooking every structural error [such as] denial of a jury trial or the right to counsel." *Id.* at 323, ¶¶ 21-22, 4 P.3d at 378, ¶¶ 21-22; *see also State v. Henley*, 141 Ariz. 465, 469, 687 P.2d 1220, 1224 (1984) (structural error to try defendant to eight-person jury when constitution guaranteed twelve-person jury for crime charged); *State v. Luque*, 171 Ariz. 198, 200, 829 P.2d 1244, 1246 (App. 1992) (trial to wrong number of jurors is fundamental, structural error).

¶107 If, as we have held, it is fundamental and structural error erroneously to exclude potential jurors or try a defendant to an insufficient number of jurors, it is difficult to see how deprivation of trial by jury at the capital sentencing phase can be less erroneous. The reason is plain: it is simply impossible to predict what a jury would have done if one had been impaneled. *State v. Smith*, 197 Ariz. 333, 339-40, 4 P.3d 388, 394-95 (App. 1999). Appellate review of such error is not "like measuring the effect of erroneous evidentiary rulings against the overall weight of properly admitted evidence. Errors involving the composition of the court or jury affect the legitimacy of the entire proceeding, leaving nothing to measure or weigh and requiring reversal." *Anderson*, 197 Ariz. at 323, ¶ 22, 4 P.3d 378, ¶ 22. The error in these cases is unlike trial errors, which can be "quantitatively assessed in the context" of all the evidence. *Arizona v. Fulminante*, 499 U.S. 279, 307, 111 S. Ct. 1246, 1264 (1991).

¶108 The majority concludes, however, that the failure to submit any part of the determination of aggravating circumstances to a jury was not structural error. Op. at ¶ 44. I cannot agree. As the majority explains, in capital sentencing prior to *Ring II*, the trial proceeded in two phases, a guilt phase and a sentencing phase. Op. at ¶¶ 7-13. The first, before a jury, was concerned only with the question of conviction or acquittal of the crime of first degree murder. The second, tried to the court under Arizona's prior sentencing statute, was concerned only with the issue of aggravating factors and mitigating circumstances. Each phase was tried to different factfinders on different issues. The Supreme Court, in these circumstances, has held that the sentencing phase resembles a separate trial, so much so that the double jeopardy clause applies both to the guilt phase and the sentencing phase. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2064 (1984); *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 1862 (1981) (double jeopardy protection attaches to capital sentencing proceeding); *Arizona v. Rumsey*, 467 U.S. 203, 209, 104 S. Ct. 2305, 2309 (1984) (Arizona capital sentencing proceedings resemble a trial for purposes of the double jeopardy clause). This was our view also. *See State v. Rumsey*, 136 Ariz. 166, 665 P.2d 48 (1983).

¶109 Complete denial of trial by jury at the sentencing phase, therefore, would seem to preclude harmless error analysis. The right to trial by jury is "fundamental to the American scheme of justice." *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S. Ct. 1444, 1447 (1968). The Supreme Court has now held defendants were entitled to a jury at the sentencing phase to determine the existence of the alleged aggravating factors but were denied that constitutional right. *Ring v. Arizona* 536 U.S., ___, ___, 122 S. Ct. 2428, 2443 (2002) *(Ring II).* As noted, in Arizona denial of a jury trial is structural error. The same rule obtains in the federal system. *Sullivan v. Louisiana,* 508 U.S. 275, 281-282, 113 S. Ct. 2078, 2083 (1993) (the deprivation of the right to a jury trial unquestionably qualifies as structural error).

¶110 The majority rejects this conclusion and supports its decision on the basis of *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1927 (1999). Op. at ¶ 44. But *Neder* and the cases that rely on it are cases of trial error, not error in the structure or mechanism of the trial. Neder was tried to a jury which was present during the entire trial. The error consisted of the trial judge failing to instruct the jury on materiality, one of the elements of the crime of tax fraud. The difference is that in *Neder,* the jury was presented with all of the evidence, and the issue of materiality was uncontested. *Neder,* 527 U.S. at 15, 119 S. Ct. at 1836. The Supreme Court held this was trial error, reviewable under a harmless error analysis. *Id.*

¶111 The present cases are different. Unlike *Neder*, the error in these cases did not occur during the presentation of the case to the jury. Instead, the error was the complete absence of the jury during the penalty phase of the trial. The jury in Ring's trial heard no evidence, nor was it asked to make findings of any kind on the aggravating circumstances of the crime. And, even if such evidence may have been introduced at the guilt phase, it was not considered by a jury in the context of the death penalty. As a consequence, a jury verdict was never returned in these cases on the greater offense of capital murder. Thus, there is simply "no object, so to speak, upon which harmless-error scrutiny can operate." *Sullivan,* 508 U.S. at 280, 113 S. Ct. at 2082.

¶112 To apply harmless error review in these consolidated cases would encourage the court to speculate that reversal is not necessary because the non-existent jury would have convicted the defendant in any event. The court, in other words, would transform itself into a phantom jury. The argument is not supportable.

¶113 In these consolidated cases, the majority must concede that the jury was erroneously discharged before the trial was completed. If this permits harmless error review, then, one must suppose, we would also review for harmless error if the trial judge directed a verdict for the state on one or more elements of the charge, granted summary judgment on an element, or discharged the jury after it had determined some but not all of the charges. Such results are also unsupportable, in my view. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id.*

¶114 Today's opinion puts the majority in the position of speculating about one of the great unknowables — what a nonexistent jury would have done. We might argue about whether some or any degree of accuracy can be obtained by such speculation, but the argument is irrelevant. Both the state and federal constitutions guarantee defendants the right to trial by jury — not for one-half of the trial, not for two-thirds, fourfifths, or nine-tenths of the trial but for the whole trial. When the jury trial guarantee is violated, I believe structural error has occurred. The Constitution does not then permit judges to conclude the error was harmless; it requires the court to conclude that the trial mechanism violated the Constitution and the result should not be affirmed.

Stanley G. Feldman, Justice (Retired)

¶115 I concur in all but Part VI of the majority opinion and join in Justice Feldman's dissent as to that part.

Charles E. Jones, Chief Justice